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No. 07-1

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

CITY OF SEATTLE, EXECUTIVE SERVICES DEPARTMENT,

Respondent.

FORD MOTOR COMPANY,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

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PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the closely–divided Washington Supreme Court erred in concluding—contrary to the Supreme Courts of Pennsylvania and Virginia—that the dormant Commerce Clause does not bar a city from imposing a business activities tax on 100 percent of a taxpayer's gross receipts derived from activities carried on in part within the city and in part in other States.

PARTIES TO THE PROCEEDINGS

The parties are as stated in the caption.

RULE 29.6 STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Ford Motor Company ("Ford") respectfully petitions this Court to grant a writ of certiorari to review the judgment of the Supreme Court of Washington in these consolidated cases.

OPINIONS BELOW

The opinion of the Supreme Court of Washington (App. 1a–40a) is reported at 160 Wn.2d 32, 156 P.3d 185. The order of the King County Superior Court in the Seattle case (App. 43a–46a) is

not officially reported. The opinion of the Pierce County Superior Court in the Tacoma case (App. 47a–58a) is not officially reported. The order of the Supreme Court of Washington denying Ford's motion for reconsideration (App. 41a–42a) is not officially reported.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on April 12, 2007. The Supreme Court of Washington denied Ford's motion for reconsideration on August 6, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Relevant portions of the Seattle and Tacoma municipal codes are set forth at App. 59a–60a.

STATEMENT

This case raises the fundamental question whether the dormant Commerce Clause prohibits a city from imposing a business activities tax on 100 percent of the gross receipts from activities carried on in part within the city and in part in other States.

The Washington Supreme Court was sharply divided on this question, but answered it in the negative, despite this Court's admonition that a business activities tax on gross receipts is "simply a variety of a tax on income, which [is] required to be apportioned to reflect the location of the various interstate activities by which it was earned." *Oklahoma Tax Commission* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 190 (1995). The court below thus held that the Cities of Seattle and Tacoma could tax Ford's *entire* gross receipts from its wholesale sales of vehicles to dealers located in those cities, even though, as the dissent explained and the majority did not dispute, "Ford's wholesaling activities were not conducted wholly within Washington: its vehicles were sold in Michigan – title, ownership, and possession are transferred when Ford delivers the vehicles to a common carrier at its factory in Michigan." App. 38a.

In contrast to the court below, the Supreme Courts of Pennsylvania and Virginia have read *Jefferson Lines* as precluding a city from imposing a business activities tax on 100 percent of the gross receipts generated by interstate business activities when some of those activities occur outside the city in other States. *Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004); *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003); *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996); *accord, Southern Pacific Transportation Co. v. Arizona*, 44 P.3d 1006 (Ariz. App. 2002). The decision below has ignored this Court's Commerce Clause doctrine and, as a result,

has precipitated a conflict with the decisions of other state courts of last resort.

1. The Cities' Business Activities Taxes

The Cities of Seattle and Tacoma ("the Cities") each impose a business activities tax[1] on the "privilege of engaging in business activities" within their respective Cities. Seattle Municipal Code (SMC) 5.45.050; Tacoma Municipal Code (TMC) 6.68.220.[2] Among the business activities taxed by both Cities is "the business of making sales . . . at wholesale." SMC 5.45.050(C); TMC 6.68.220(B). For any taxpayer engaged in the business of wholesaling within the Cities, the tax is measured by the gross receipts from wholesale sales of goods to buyers located in the Cities, regardless of where the actual sales at wholesale occur. App. 59a; App.60a; ("it does not matter in which jurisdiction the actual sales at wholesale occur"; App. 9a). The tax rate is 0.215% of gross receipts in Seattle and 0.102% in Tacoma. App. 59a; App. 60a.

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[1] The petition employs the term "business activities tax" to refer to those taxes that are imposed on the privilege of engaging in business activity in a taxing jurisdiction and are measured by the gross receipts from such activity, whether denominated a "business and occupation" tax (as were the taxes in Seattle and Tacoma), a "business privilege" tax, or a "business gross receipts" tax.

[2] All references are to the Cities' municipal codes in force during the tax years at issue. The Seattle code was amended during the audit period, but the revisions did not impact the court's analysis, App. 5a n.1. The petition follows the decision below in referring to the amended version of the Seattle code.

2. Ford's Business

There is no dispute about the material facts.[3] Ford is a Delaware corporation with its principal place of business in Dearborn, Michigan. Ford manufactures and sells vehicles throughout the United States and in many foreign countries. Ford makes wholesale sales of vehicles, parts, and accessories to independent dealers throughout the United States (including in the Cities of Seattle and Tacoma). These dealers in turn make retail sales of Ford products to individual consumers.

Ford's wholesaling activities that ultimately result in the receipt of a vehicle by a Seattle or Tacoma dealer include an eight–stage "order flow process," most of which occurs outside of the Cities and the State of Washington. App. 101a–109a. Ford's wholesaling activities within the Cities include advertising, meetings with dealers, and imparting information about new products.[4] Other wholesaling activities—including sales forecasting,

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[3] The facts were largely stipulated in the Tacoma case. App. 97a–112a. These facts are also reflected in the undisputed affidavits that Ford filed in opposition to Seattle's motion for summary judgment in the Seattle case. See App. 44a (listing Ford's affidavits). Indeed, in its brief to the court below, the City of Seattle recognized that "[t]here are no material facts in dispute." Br. City of Seattle 8, *Ford Motor Co. v. City of Seattle*, No. 77516–8, Wash. Sup. Ct., Feb. 1, 2006.

[4] Ford acknowledges that the limited wholesaling activities in which it engages in the Cities are sufficient to establish a taxable presence that permits the Cities to impose a business activities tax on *some portion*, but not 100 percent, of the gross receipts generated by its multi-state wholesaling activities that result in sales to dealers located in the Cities. App. 73a, 93a.

dealer allocation, review of dealer commitments, and scheduling—occur in Dearborn, Michigan. App. 103a–104a. Dealer invoices and Certificates of Origin for vehicles destined for Seattle and Tacoma are prepared in Troy, Michigan. App. 111a–112a. The transfer of title, ownership, and possession of the vehicle from Ford to the dealer takes place when Ford transfers the assembled vehicle to a common carrier at one of its vehicle assembly plants in Georgia, Illinois, Kentucky, Michigan, Missouri, Ohio, New Jersey, and Virginia. App. 109a. The final step in the wholesaling process is shipment of the vehicle by the carrier to the dealer in Seattle or Tacoma. App. 109a–110a.

3. The Tax Assessments and Refund Claims

The City of Seattle audited Ford for the period January 1998 through December 2002. It assessed a tax against 100 percent of Ford's gross receipts from wholesaling activities associated with sales of vehicles to dealers located in Seattle. The assessment amounted to roughly $400,000. App. 63a. The City of Tacoma audited Ford for the period January 1990 through December 2002. It assessed a tax against 100 percent of Ford's gross receipts from wholesaling activities associated with sales of vehicles to dealers located in Tacoma. That assessment amounted to roughly $1,300,000, including interest and penalties. App. 83a. After paying both assessments, Ford filed suit in King County Superior Court seeking a refund of the Seattle tax and in Pierce County Superior Court seeking a refund of the Tacoma tax. App. 61a–79a, App. 80a– 96a.

4. The Proceedings Below

In both the King County Superior Court (Seattle) and the Pierce County Superior Court (Tacoma), Ford challenged the validity of the assessment on various state and federal grounds, including the Commerce Clause claim that each City's business activities tax unduly burdens interstate commerce by failing to fairly apportion the tax to Ford's activities condu ted within the City. Seattle Complaint ¶ 56 (App. 74a); Tacoma Complaint ¶ 70 (App. 93a). Both trial courts ruled against Ford. App. 43a–46a; App. 47a–58a. Because "both cases presented issues of substantial public importance," App. 4a, the Washington Supreme Court granted direct review and consolidated the appeals.

By a 5–4 majority, the Washington Supreme Court rejected Ford's Commerce Clause claim. The majority relied principally on this Court's decision in *Tyler Pipe Industries, Inc.* v. *Washington Department of Revenue*, 483 U.S. 232 (1987). In *Tyler Pipe*, this Court rejected an argument that a taxpayer's out–of–state manufacturing activities mandated apportionment of Washington State's business activities tax on gross receipts derived from making sales at wholesale in the State. This Court held that because manufacturing and wholesaling were separate business activities, it was not necessary to apportion the taxpayer's gross receipts from wholesaling to reflect its out–of–state manufacturing activities. *Id.* at 251.

Although it is undisputed in this case that much of Ford's wholesaling activity actually occurred

outside the Cities and Washington State, App. 101a–112a, the majority below nevertheless concluded that wholesaling is "an activity separate from manufacturing, design, and the like, which under *Tyler Pipe* must be considered conducted entirely within the destination city." App 19a–20a. The majority expressly disagreed with the cases from other state courts requiring the apportionment of business activities taxes on gross receipts. It found "none of these cases persuasive" (App. 20a), either because they did not involve *interstate* commerce or because they purportedly recognized that "'the state of destination can tax selling activity,' without requiring apportionment." App. 21a (quoting *Philadelphia Eagles*, 823 A.2d at 129). The majority failed to note that the Pennsylvania Supreme Court's comment in the *Philadelphia Eagles* case was simply describing the historical analogy that this Court once had drawn between sales taxes and business activities taxes—an analogy, the Pennsylvania court accurately observed, from which "the Supreme Court has distanced itself." *Philadelphia Eagles*, 823 A.2d at 130.

In any event, the majority below found no need to pursue the question of how this Court's decision in *Jefferson Lines* might affect proper analysis of the fair apportionment question because the Washington court had "previously rejected the argument that *Jefferson Lines* somehow required us to revisit and overturn *Tyler Pipe's* holding." App. 21a.

The four–member dissent below concluded that the Cities' taxation of 100 percent of Ford's gross receipts from its interstate wholesaling

activities violated the Commerce Clause's fair apportionment requirement: "Clearly, Ford's wholesaling activities were not conducted wholly within Washington: its vehicles were sold in Michigan—title, ownership, and possession are transferred when Ford delivers the vehicles to a common carrier at its factory in Michigan." App. 38a. The dissent distinguished *Tyler Pipe* because "unlike Ford, Tyler Pipe sold its products in Washington." *Id.* Moreover, the dissent noted, "the cities' tax on sales made in Michigan also burdens interstate commerce because of the threat of double taxation." *Id.* Tracking this Court's reasoning in *Jefferson Lines*, the dissent pointed out that "[t]he Supreme Court has said that there is a risk of double taxation 'whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed." *Id.* (quoting *Jefferson Lines*, 514 U.S. at 184).

REASONS FOR GRANTING THE PETITION

The 5–4 decision of the Washington Supreme Court warrants review for two compelling reasons. First, the decision below has created a clear conflict with decisions of other state courts of last resort over the important question whether the dormant Commerce Clause bars a city from imposing a business activities tax on 100 percent of a taxpayer's gross receipts derived from activities carried on in part within the city and in part in other States. The answer to that question turns on whether this Court's declaration in *Jefferson Lines*—that a business activities tax on gross receipts tax is "simply a variety of a tax on income, which [is] required to be apportioned to reflect the location of

the various interstate activities by which it was earned" (514 U.S. at 190)—means what it says. Most state courts have concluded that it does; the decision below concluded that it does not.

Second, the question whether a business activities tax on gross receipts must be "apportioned to reflect the location of the various interstate activities by which it was earned" is one of great and growing national significance. With nearly 1,200 local jurisdictions and an increasing number of States relying on business activities taxes on gross receipts as a major source of revenue, litigation over the proper apportionment of such levies has increased dramatically in recent years. This Court's intervention is required to assure that multistate enterprises are not subject to "act[s] of overreaching" by States and localities (*Jefferson Lines*, 514 U.S. at 184), with the consequent risks of multiple and extraterritorial taxation that undermine the national common market the Commerce Clause was designed to protect.

I. THIS COURT SHOULD RESOLVE THE CLEAR CONFLICT BETWEEN STATE COURTS OF LAST RESORT OVER WHETHER A CITY MAY TAX 100 PERCENT OF THE GROSS RECEIPTS FROM BUSINESS ACTIVITY CARRIED ON IN PART IN OTHER STATES.

In holding that Seattle and Tacoma may impose a business activities tax on the unapportioned gross receipts from activities that are conducted only in part within the Cities and in substantial part in other States, the Washington

Supreme Court has created a clear conflict with decisions of other state courts of last resort on an important federal question. The decision below unequivocally holds that it is of no constitutional moment that the activities generating the gross receipts that Seattle and Tacoma seek to tax—namely, "engaging . . . in the business of making sales . . . at wholesale"—occurred primarily outside the Cities and Washington State: "The fact that some portions of the wholesaling process take place outside of the taxing jurisdiction is not controlling and does not . . . require the Cities to exclude such activities from the tax measure." App. 24a. This holding is irreconcilable with the holdings of the Supreme Courts of Pennsylvania and Virginia, and with other state courts as well.

Two Pennsylvania Supreme Court decisions squarely hold that a city may not apply its business activities tax to the unapportioned gross receipts from activities that are conducted only in part within the city and in substantial part in other taxing jurisdictions. In *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003), the Pennsylvania Supreme Court considered the application of Philadelphia's business activities tax that is imposed on the gross receipts of "every person engaging in any business in the City of Philadelphia." *Id.* at 113. The City of Philadelphia, like the Cities of Seattle and Tacoma, sought to impose its tax on the unapportioned gross receipts that the taxpayer derived from activities carried on only partly within the city, namely, the Eagles' share of National Football League receipts attributable to the television broadcast of the Eagles' games, only half of which were played in Philadelphia.

The Pennsylvania court first addressed and flatly rejected the city's position—like the position of the majority below—that apportionment was unnecessary because the business activities tax, "as a gross receipts tax upon the privilege of doing business, is exempt from the Commerce Clause apportionment requirement." *Id.* at 129. The court observed that "the Supreme Court made clear in *Oklahoma Tax Commission v. Jefferson Lines* that a gross receipts tax is 'simply a *variety of a tax on income which [is] required to be apportioned* to reflect the location of various activities by which it [is] earned.'" *Id.* at 130 (quoting *Jefferson Lines*, emphasis and brackets supplied by the Pennsylvania court).

The court then considered whether the Philadelphia tax satisfied the fair apportionment requirement. It concluded that "[t]he City's levy on 100% of the Football Club's media receipts, when half of the Eagles Team's football games were telecast from NFL venues outside of Philadelphia, was inherently arbitrary and had no rational relationship to the Football Club's business activity that occurred *in Philadelphia*." *Id.* at 132 (emphasis in original). The court further observed that "by reaching beyond its borders and taxing receipts from the Football Club's business activities in other jurisdictions, the City clearly put the Football Club at risk of being subjected to multiple taxation." *Id.* at 132–33.

The Pennsylvania Supreme Court reached a similar result in *Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004). There, the court invalidated a township's

business activities tax measured by the taxpayer's unapportioned gross receipts from activities carried on only in part in the township. It held that "the Township is plainly taxing more than that 'portion of the revenues from [Northwood's] interstate activities which reflect the in-state activities being taxed,' as it is taxing *all* of the revenues from Northwood's interstate activities." *Id.* at 805 (emphasis and brackets in original, citation omitted, quoting *Goldberg* v. *Sweet*, 488 U.S. 252, 262 (1988).) Consequently, the township's tax violated the Commerce Clause because it "'reach[ed] beyond that portion of value that is fairly attributable to economic activity within the taxing State . . . .'" *Id.* (quoting *Jefferson Lines*, 514 U.S. at 185).

Relying on *Jefferson Lines*, the Virginia Supreme Court has likewise held, contrary to the decision below, that the Commerce Clause prohibited a city from applying its business activities tax to 100 percent of a taxpayer's gross receipts from interstate activities, when only a portion of those activities occurred within the city. In *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996), a manufacturing corporation headquartered in the city operated manufacturing, storage, and distribution facilities throughout the United States. The city sought to apply its business activities tax to 100 percent of the taxpayer's gross receipts on the theory that "all of the taxpayer's gross receipts are in some way attributable to the headquarters office . . .." *Id.* at 498. In holding that such an assessment violated the Commerce Clause's fair apportionment requirement, the court declared:

> By definition, assessments based on 100% of American Woodmark's revenues included revenues realized from value produced in locations other than in the taxing jurisdiction. Given the number of facilities and operations outside of Winchester, it is equally axiomatic that the value added to the product by the Winchester operations could not possibly produce 100% of the revenues.

Id.

Other state courts have likewise read this Court's opinion in *Jefferson Lines* as articulating a dormant Commerce Clause principle requiring the apportionment of business activities taxes on gross receipts from interstate activities to reflect only the local revenue–generating portion of the activities. *See, e.g., Southern Pacific Transportation Co. v. Arizona*, 44 P.3d 1006, 1014 (Ariz. App. 2002) (observing that "*Jefferson Lines* compels the view that gross receipts taxes . . . must be apportioned to comply with the dormant Commerce Clause" and invalidating an unapportioned tax on a railroad's gross receipts from transporting copper concentrate from one point to another in the State, when a portion of the journey occurred outside the State); *General Motors Corp. v. City & County of Denver*, 990 P.2d 59, 71 (Colo. 1999) ("In the context of income taxes or taxes on gross receipts, apportionment *must* take into account the location where revenue is generated" (emphasis in original, citing *Jefferson Lines*)).

The majority below attempted to distinguish only one of the foregoing state court decisions. Asserting that the Pennsylvania Supreme Court's decision in *Philadelphia Eagles* "actually contradicts Ford's argument" that business activities taxes must be apportioned, the court elaborated:

> While the Pennsylvania Supreme Court did limit the reach of Philadelphia's business privilege tax on *services* to receipts from services performed in the city, it recognized and emphasized that in levying a gross receipts tax on activities involving *manufacturing and sales*, "the state of origin can tax the manufacturing activity, and the state of destination can tax the selling activity," without requiring apportionment.

App. 20a–21a (emphasis in original). As previously noted, however, the majority below completely ignored the fact that the Pennsylvania court's comment on the purported right of a destination State to tax selling activity without apportionment was simply a description of the analogy that this Court once had drawn between sales taxes and business activities taxes—an analogy from which "the Supreme Court has distanced itself." *Philadelphia Eagles*, 823 A.2d at 130.

Indeed, it is the rejection of that very analogy in *Jefferson Lines*—a rejection recognized and relied upon by other state courts in requiring the apportionment of business activities taxes on gross receipts—that lies at the heart of the conflicting state court decisions on the question here presented.

In *Jefferson Lines*, this Court considered whether Oklahoma could impose a sales tax on the gross receipts derived from the sale of bus tickets to individual passengers for interstate transportation. The taxpayer contended that the tax violated the Commerce Clause's fair apportionment requirement because it was measured by the full purchase price of the bus ticket, even though a portion of the price was attributable to transportation services to be rendered in other States. In particular, the taxpayer argued that Oklahoma's sales tax was indistinguishable from the business activities tax at issue in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653 (1948). In that case, this Court invalidated a business activities tax on the unapportioned gross receipts derived by an interstate bus company from tickets sold in New York, because the receipts reflected payment for transportation services to be performed partially in other States.

This Court in *Jefferson Lines* sustained Oklahoma's sales tax on the full purchase price of the interstate bus ticket. In so doing, the Court drew a sharp distinction between *sales* taxes, which are *transaction* taxes *imposed on the buyer* and on a particular event (namely, a sale) that takes place at one location and at one point in time, and *business activities* taxes, which are *imposed on the seller* and are directed to business *operations* (or a category of operations, *e.g.*, wholesaling) that can take place in multiple jurisdictions over a period of time and which thereby create a risk of both extraterritorial and multiple taxation.

As this Court explained in *Jefferson Lines*, there is a critical difference between these two types of levies in terms of the Commerce Clause's fair apportionment requirement and the risk of extraterritorial and multiple taxation that fair apportionment is designed to prevent. Alluding to its long-standing treatment of sales taxes on goods, this Court observed that "[a] sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale . . . ." *Jefferson Lines*, 514 U.S. at 186. Because the sale of goods "has been found properly to be treated as unique," *id.* at 188, a "conventional sales tax has long been held to be externally consistent," *id.*, *i.e.*, not to involve extraterritorial "overreaching." *Id.* at 185. Moreover, a sales tax creates no risk of multiple taxation because "the very conception of the common sales tax on goods, operating on the transfer of ownership and possession at a particular time and place, insulated the buyer from any threat of further taxation of the transaction." *Id.* at 187.

In *Jefferson Lines*, this Court simply extended its "sales tax on goods" analysis to a sales tax on services, some portion of which would be rendered in other States. This Court declared that "[a] sale of services can ordinarily be treated as a local state event just as readily as a sale of tangible goods can be located solely within the State of delivery." *Id.* at 188. Beyond the lack of any "impermissible overreaching" (*id.* at 185) in a territorial sense, there was no risk of multiple taxation because "[t]he taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination." *Id.* at 190.

By contrast, when this Court turned its attention from a *sales tax* imposed *on the buyer* and on a particular *transaction* to a *business activities tax* imposed *on the seller* and on a set of *activities*, it reaffirmed the basic Commerce Clause rule, reflected in cases like *Central Greyhound*, that such levies must be apportioned to reflect the local activities that the State may legitimately tax. In repudiating the taxpayer's effort in *Jefferson Lines* to justify apportionment in a sales tax context by analogizing Oklahoma's sales tax to the business activities tax involved in *Central Greyhound*, this Court stated flatly that "*Central Greyhound* provides the *wrong* analogy" for resolving the question before it. *Id.* (Emphasis supplied.)

While recognizing that both levies involved a tax measured by receipts from the same interstate bus services and that apportionment was feasible in both cases, this Court continued with a passage over which state court decisions are in conflict:

> But the two diverge crucially in the identity of the taxpayers *and the consequent opportunities that are understood to exist for multiple taxation of the same taxpayer. Central Greyhound* did not rest simply on the mathematical and administrative feasibility of a mileage apportionment, but on the Court's express understanding that the *seller – taxpayer* was exposed to taxation by New Jersey and Pennsylvania on portions of the same receipts that New York was taxing in their entirety. The

> Court thus understood the gross receipts tax to be simply a variety of tax on income, which was required to be apportioned to reflect the location of the various interstate activities by which it was earned.

Id. (emphasis supplied).

Fidelity to the distinction that led this Court to approve an unapportioned sales tax in *Jefferson Lines*, while reaffirming its rejection of an unapportioned business activities tax in *Central Greyhound*, requires fair apportionment here. If Seattle and Tacoma had imposed a sales tax on a dealer's purchase of a Ford vehicle, there would have been no right to an apportionment of the sales price for the reasons this Court set forth in *Jefferson Lines*—namely, that a sales tax is a transaction tax that "falls on the buyer" (*id.*) and on a unique "taxable event." *Id.* (In fact, both Seattle and Tacoma impose a sales tax on sales by dealers to customers. SCM 5.60.010; TCM 6A.70.010.) But, as the decision below made clear, the Seattle and Tacoma taxes here involved are *not* sales taxes.

> A tax imposed on the actual sale of products is, by definition, a sales tax. B & O[5] taxes, on the other hand, are not sales taxes. The Cities' municipal codes plainly tell us that their B & O taxes are imposed on "the act or

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[5] The Cities' business activities taxes were denominated "business and occupation" or "B & O" taxes. See note 1 *supra*. See also p. 4 *supra* (describing the Cities' taxes).

> privilege of engaging in business activities within the City." Therefore, the plain meaning of the statutes at issue is that the taxable incident . . . is "*engaging* within the City *in the business of* making sales . . . at wholesale," not merely "making sales at wholesale."

App. 8a (citation omitted, emphasis added by the court below, second ellipsis in original). There can therefore be no dispute that the Seattle and Tacoma taxes at issue here fall squarely within the category of business activities taxes (as distinguished from sales taxes) that, like the tax at issue in *Central Greyhound*, must be apportioned to reflect the local activities generating the gross receipts that may properly be subjected to tax.

In rejecting that proposition, the majority below relied primarily on this Court's decision in *Tyler Pipe*. That case rebuffed a fair apportionment challenge to Washington's state–level business activities tax imposed on an out–of–state manufacturer's unapportioned gross receipts derived from making wholesale sales in the State. The majority below summarily dismissed "the argument that *Jefferson Lines* somehow required us to revisit . . . *Tyler Pipe*'s holding." App. 21a.[6] But the majority's reliance on *Tyler Pipe* is misplaced.

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[6] The court noted that it had "previously rejected" that argument, App. 21a, referring to an equally summary dismissal of a fair apportionment challenge to Washington's business activities tax based on *Jefferson Lines*. *W.R. Grace & Co. v.*

In *Tyler Pipe*, substantially all of the taxpayer's wholesaling activities took place within the State. The taxpayer argued that the gross receipts from its sales at wholesale should be apportioned to reflect the fact that the goods it sold were manufactured out–of–state. This Court rejected the taxpayer's argument because it was based on the "erroneous assumption" that Washington was taxing gross receipts from "the unitary activity of manufacturing and wholesaling." 483 U.S. at 251. This Court concluded that "the activity of wholesaling—whether by an in–state or an out–of–state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Id.* It is thus clear that this Court's sole focus in *Tyler Pipe* was on the relationship between the activity of "manufacturing" and the activity of "wholesaling." Because each was considered a separate and distinct activity that could be the proper subject of a business activities tax, there was no justification for apportioning the receipts derived from wholesaling to take account of manufacturing done elsewhere.

Here, by contrast, the sole focus is on the activity of wholesaling and wholesaling alone, not on wholesaling versus manufacturing. Ford makes no claim that its out–of–state *manufacturing* activities justify apportionment. Rather, Ford's position is that its substantial out–of–state *wholesaling* activities, including the transfer of title, ownership, and possession of vehicles to dealers at its various

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Department of Revenue, 973 P.2d 1011 (Wash.), *cert. denied*, 528 U.S. 950 (1999).

out–of–state assembly plants, are what require apportionment here. No such argument was considered by this Court in *Tyler Pipe*.

In short, the majority's holding below—that "[t]he fact that some portions of the wholesaling process take place outside of the taxing jurisdiction is not controlling and does not . . . require the Cities to exclude such activities from the tax measure"—is not supported by this Court's decision in *Tyler Pipe* because that case simply did not address the apportionment issue raised here. Indeed, the holding below flies in the face of this Court's admonition in *Trinova Corp.* v. *Michigan Department of Treasury*, 498 U.S. 358 (1991), that "labeling . . . a tax on 'business activity'" does not permit a court to "forgo examination of the actual tax base and apportionment." *Id.* at 374 ("'[a] tax on sleeping measured by the number of pairs of shoes in your closet is a tax on shoes.'" *Id.* (citation omitted)).

Moreover, to the extent *Tyler Pipe* is thought to stand for the proposition that wholesaling activities result in local sales transactions that are properly taxable in full where the sales take place, then Ford, unlike Tyler Pipe, would clearly be subject to multiple taxation because the transfer of title, ownership, and possession of its vehicles takes place in other taxing jurisdictions outside Washington State and there would be nothing to prevent those jurisdictions from claiming that the sales at wholesale actually take place there.

At a minimum, as other state court decisions considering similar Commerce Clause challenges have recognized, *Jefferson Lines* requires a

reevaluation of many of this Court's earlier decisions that may be read as sanctioning business activities taxes measured by the unapportioned gross receipts from activities carried on both within and without the taxing jurisdiction. *See Philadelphia Eagles*, 823 A.2d at 130; *Southern Pacific*, 44 P.3d at 1014. This Court's guidance is now required to determine which state courts are correctly reading *Jefferson Lines*.

II. THE FAIR APPORTIONMENT ISSUES RAISED BY THE PROLIFERATION OF STATE AND LOCAL BUSINESS ACTIVITIES TAXES ARE A SOURCE OF GREAT NATIONAL CONCERN.

The fair apportionment issues raised by the decision below are symptoms of a problem of great and growing national significance. Today, nearly 1,200 counties, cities, towns, and other state political subdivisions impose business activities taxes on gross receipts derived from operations carried on within their localities.[7] Among those localities are the Cities of Atlanta, Birmingham, Kansas City, Los Angeles, Oakland, Philadelphia, Pittsburgh, St. Louis, and, of course, Seattle and Tacoma.[8] Moreover, such taxes exist at the state level as well,[9]

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[7] *See* Ernst & Young, E tax Alert, Quantitative Economics and Statistics; State and Local Taxation (March 7, 2007) available through http://www.ey.com/global/content.nsf/US/Tax_-_Quantitative_Economics_and_Statistics_-_Overview.

[8] *Id.*

[9] Several States, like Washington, have employed gross receipts taxes for many years. Wash. Rev. Code § 82.04.220, *et seq.*. *See also* Del. Code Ann. tit. 30, § 2902; Haw. Rev. Stat. § 237-13.

with Kentucky, Michigan, and Ohio having adopted state–level business activities taxes, measured in whole or in part by gross receipts, in just the last two years.[10] *See* John L. Mikesell, *State Gross Receipts Taxes and Fundamental Principles of Tax Policy*, State Tax Notes, March 5, 2007, p. 615.

Business activities taxes imposed on gross receipts have spawned considerable litigation as to whether they satisfy the Commerce Clause's fair apportionment requirement. The results can at best be described as confusing and inconsistent. *See generally* Kelly W. Smith & John M. Allan, *Commerce Clause Implications of Locally Imposed Gross Receipts Based Taxes*, 8 State & Local Tax Lawyer 33 (2003). In addition to the conflicting decisions described earlier in this petition, other state courts have issued similarly conflicting decisions over the question whether the Commerce Clause requires apportionment of business activities taxes on gross receipts to reflect activities carried on within and without the taxing jurisdiction.[11] Indeed,

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[10] Ky. Rev. Stat. Ann. § 141.0401; Mich. Comp. Laws. § 208.1203; Ohio Rev. Code Ann. 5751.02. These levies vary in their detail, but all contain gross receipts tax measures as at least one component of the tax base.

[11] Thus, some state courts have held that the Commerce Clause requires such apportionment. *See, e.g., M & Associates, Inc. v. City of Irondale*, 723 So. 2d 592 (Ala. 1998) (Commerce Clause bars city from applying business activities tax to unapportioned gross receipts from a business's sales made from its facilities both inside and outside the city limits); *Ford Motor Co. v. City of Hazelwood*, No. 02CC–002296 (St. Louis Cty. Cir. Ct., Mo. Aug. 26, 2003) (Commerce Clause bars city from applying business activities tax to unapportioned gross receipts from vehicles assembled in city); *KMS Fin. Servs. Inc. v. City of Seattle*, 134 Wash. App. 1067 (2006) (Commerce Clause bars

in anticipation of yet further litigation of this genre, the Ohio Legislature adopted a special appeals process for constitutional challenges to its recently enacted business activities tax on gross receipts. Ohio Rev. Code Ann. § 5751.31.

In short, the questions presented by the Washington Supreme Court's decision concerning the Seattle and Tacoma business activities taxes reflect a problem of increasing national concern on which the state courts are divided. This Court's immediate intervention is both warranted and essential to avoid continuing and repetitive litigation of this issue across the country and to provide the appropriate safeguards to preserve the sound

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city from applying business activities tax to unapportioned gross receipts of a broker–dealer generated by registered representatives working in other States).

Other state courts, however, have held that the Commerce Clause does not require such apportionment. *Centric–Jones Co. v. Town of Marana*, 937 P.2d 654 (Ariz. App. 1996) (Commerce Clause does not bar State from applying business activities tax to contractor's gross receipts, although 15.2% of the contracting activity occurred outside the taxing jurisdiction); *Saudi Refining, Inc. v. Director of Revenue*, 715 A.2d 89 (Del. Super. 1998) (Commerce Clause does not bar a State from applying business activities tax to unapportioned gross receipts from wholesale sales consummated by physical delivery in state); *ITT Educ. Servs., Inc. v. Taxation & Revenue Dep't of New Mexico*, 959 P.2d 969 (N.M. 1998) (Commerce Clause does not bar State from applying business activities tax to school's unapportioned receipts for its services, although some portion of the services were performed outside of State); *Promus Hotels, Inc. v. City of Charleston*, No. 01–AA–142 (W. Va. Cir. Ct. Kanawha Cty. March, 18, 2003) (Commerce Clause does not bar city from applying business activities tax to unapportioned gross receipts derived by taxpayer from franchisees located in the city).

functioning of our national common market that the Commerce Clause protects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Supreme Court of the State of Washington

FORD MOTOR COMPANY, Appellant, v. CITY OF SEATTLE, EXECUTIVE SERVICES DEPARTMENT, Respondent FORD MOTOR COMPANY, Appellant, v. CITY OF TACOMA, Respondent	NOs. 77167-7, 77516-8

ALEXANDER, C.J. We granted direct review of two separate trial court orders that upheld the imposition by the cities of Seattle and Tacoma (Cities) of a business and occupation (B & O) tax upon the Ford Motor Company (Ford) for its activities related to being in the business of making wholesale sales to dealers. Ford filed separate legal actions against both Cities in order to recover B & O

taxes, interest, and penalties it paid. We now review whether the Cities used the proper tax classification and tax measure in calculating Ford's B & O taxes. We conclude that they did and consequently affirm the determinations of both trial courts.

I

Ford is a Delaware corporation, registered to do business in the state of Washington. Ford's principal place of business is in Dearborn, Michigan. Ford has manufacturing plants in several states, but none in Washington. Although Ford maintains an office in Bellevue, Washington, it does not directly sell vehicles to consumers in the cities of Seattle or Tacoma.

Ford does, however, sell automobiles, parts, and accessories to independent dealers located within the cities of Seattle and Tacoma. These dealers, in turn, sell the automobile parts and accessories to retail customers. Ford also conducts a variety of business activities within Seattle and Tacoma related to the sale of its cars, parts, and accessories to dealers. These activities include: advertising, sending representatives to meet with its dealers and their part managers, imparting information about new products, discussing problems and customer satisfaction concerns, and marketing and selling warranties on its automobiles. Ford has stipulated that all of these activities were for the business purposes of selling Ford products to dealers located in Tacoma and Seattle and helping those dealers sell Ford products to retail customers.

The City of Seattle audited Ford for the period of January 1998 through December 2002. It then assessed a B & O tax, on the ground that Ford was engaged within Seattle in the business of making sales at wholesale and assessed the tax on the entire gross proceeds from vehicles sold to Seattle dealers. Ford paid the assessed amount of $401,968. It then filed a lawsuit in King County Superior Court to obtain a refund and declaratory judgment as to the proper method of calculating its tax liability. The City of Seattle moved for a summary judgment dismissing Ford's claims. The trial court granted the City's motion, determining that there was no merit to Ford's claims that (1) it did not make sales within the City of Seattle as that term is used in the Seattle Municipal Code and (2) the gross income Ford received from its dealerships had to be apportioned in order to be constitutional.

The City of Tacoma also audited Ford, imposing a B & O tax, interest, and penalties for the period from January 1, 1990, through December 31, 2002 (audit period). Ford paid the amount assessed of $1,307,933.83 and filed suit in Pierce County Superior Court seeking a refund. After a bench trial, the trial court dismissed Ford's classification and apportionment challenges, which were the same as those made in the King County suit. That court also denied Ford's separate claims that (1) the City of Tacoma was barred from collecting taxes for the period from 1994 through 1999 by the statute of limitations and (2) Ford was not properly assessed.

Ford appealed both the King County summary judgment order and the Pierce County trial

judgment, seeking direct review in this court. The two appeals were consolidated, and review was granted pursuant to RAP 4.2(a)(4), our court determining that both cases presented issues of substantial public importance.

II

A B & O tax is an excise tax imposed for "the privilege of doing business" in a particular jurisdiction. 1B KELLY KUNSCH ET AL., WASHINGTON PRACTICE: METHODS OF PRACTICE § 72.7, at 452 (1997). Washington imposes a B & O tax for the privilege of doing business in this state. RCW 82.04.220. Cities may also impose their own B & O tax for the exercise of the privilege within that city. The value of the "privilege is measured by the gross proceeds of the business; the rate of tax is determined by the type of business in which the taxpayer is engaged." 1B KUNSCH ET AL., *supra*, § 72.7, at 452.

A tax statute has three basic elements: "First, there must be an incident that triggers the tax." *Id.* § 72.3, at 449. The "taxable incident" is the "activity that the legislature has designated as taxable." *Id.* Second, there must be a base that represents the value of the taxable incident. This is known as the "tax measure." *Id.* Third, there must be a "tax rate," which, when multiplied by the tax measure, determines "the amount of tax due." *Id.* At issue in this case are the taxable incident and tax measure of Seattle and Tacoma's B & O tax.

A. The Taxable Incident

It is well established that the tax "incident" for a B & O tax is generally the " 'act or privilege of engaging in business activities' " in the taxing jurisdiction. *Id.* § 72.6, at 451 (quoting RCW 82.04.220). Unlike a sales tax, which taxes a specific sale of a good or service, the B & O tax is imposed on the general privilege of engaging in business. As noted above, Seattle and Tacoma both impose B & O taxes on the "privilege of engaging in business activities within" their respective cities. Seattle Municipal Code (SMC) 5.45.050; former Tacoma Municipal Code (TMC) 6.68.220 (1998).[1]

A major determinant of B & O tax liability is how the taxed activity is classified. Under the relevant codes, the tax rate is based upon the type of business activity performed by the taxed entity within the applicable city. The various types of activity include (1) "engaging ... in the business of making sales ... at wholesale" within the city, under SMC 5.45.050(C), and (2) the general classification for engaging within the city in "any business activity other than or in addition to those enumerated in the

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[1] During the audit period, the City of Seattle reorganized and amended its tax code by enacting chapter 5.45 SMC and repealing chapter 5.44 SMC effective January 1, 2002. Consequently, two different code provisions were in effect. Despite the change, the substance of the city's B & O taxation scheme remains substantively the same and the revisions do not impact the analysis in this case.

above subsections," under SMC 5.45.050(G). *See* former TMC 6.68.220(B)(F)(2).[2]

The Cities imposed their B & O tax on Ford under the "engaging in the business of making sales at wholesale" provision. In relevant part, Seattle's provision is as follows:

> Upon every person engaging within the City in the business of making sales ... at wholesale or retail ...; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of such sales of the business without regard to the place of delivery of articles, commodities or merchandise sold, multiplied by the rate of two hundred fifteen one-thousandths of one percent (.00215).

SMC 5.45.050(C). The City of Tacoma has a similarly worded provision in its tax code, former TMC 6.68.220(B), with the exception that its tax rate is one hundred two one-thousandths of one percent (.00102).

Ford contends that its activities were improperly classified because it did not make sales at wholesale within the Cities. Ford would have us

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[2] The tax rate on "making sales" is .00215 in Seattle and .00102 in Tacoma. SMC 5.45.050(C); former TMC 6.68.220(B). The tax rate on other business activities is .00415 in Seattle and .0038 in Tacoma. SMC 5.45.050(G); former TMC 6.68.220(F).

construe SMC 5.45.050(C) and former TMC 6.68.220(B) narrowly, holding the taxable incident to be the actual sale of products within the respective taxing jurisdictions to dealers. Ford contends that proper application of the B & O tax ordinances would classify its business activities in the Cities under the "other business activities" provisions.

In analyzing the positions of the parties, we start with the principle that the burden is on the taxpayer to prove that a tax paid by him or her is incorrect. In other words, "[t]axes are presumed to be just and legal, and the burden rests upon one assailing the tax to show its invalidity." 72 AM.JUR.2D *State and Local Taxation* § 1000 (2001).

Municipal ordinances, such as the ordinances at issue here, are local statutes that are to be construed according to the rules of statutory construction. *McTavish v. City of Bellevue,* 89 Wash.App. 561, 565, 949 P.2d 837 (1998). Where a statute is clear on its face, its plain meaning should "be derived from the language of the statute alone." *Kilian v. Atkinson,* 147 Wash.2d 16, 20, 50 P.3d 638 (2002) (citing *State v. Keller,* 143 Wash.2d 267, 276, 19 P.3d 1030 (2001)). Constructions that would render a portion of a statute "meaningless or superfluous" should be avoided. *Keller,* 143 Wash.2d at 277, 19 P.3d 1030. Construction of a statute is a question of law that is reviewed *de novo. W. Telepage, Inc. v. City of Tacoma,* 140 Wash.2d 599, 607, 998 P.2d 884 (2000). However, when construing an ordinance, a "reviewing court gives considerable deference to the construction of" the challenged ordinance "by those officials charged with

its enforcement." *Gen. Motors Corp. v. City of Seattle,* 107 Wash.App. 42, 57, 25 P.3d 1022 (2001).

Here, the Cities, who enforce their own municipal codes, reach the same conclusion as the trial courts: A B & O tax on engaging in the business of wholesaling is levied upon the privilege of doing business as a wholesaler, not upon the actual sales at wholesale. We agree. A tax imposed on the actual sale of products is, by definition, a sales tax. B & O taxes, on the other hand, are not sales taxes. The Cities' municipal codes plainly tell us that their B & O taxes are imposed on "the act or privilege of engaging in business activities within the City." SMC 5.45.050; former TMC 6.68.220. Therefore, the plain meaning of the statutes at issue is that the taxable incident in SMC 5.45.050(C) and former TMC 6.68.220(B) is "*engaging* within the City *in the business of* making sales ... at wholesale," not merely "making sales at wholesale." (Emphasis added.) To find otherwise would render the words "engaging ... in the business of" superfluous.

Engaging in the business of wholesaling encompasses more business activities than merely making sales. Both Seattle and Tacoma define "business" within their tax code as "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." SMC 5.30.020(G); former TMC 6.68.125 (1965). This definition is intentionally broad. *See* SMC 5.30.030(B)(5). The SMC offers several specific examples of activities considered "engaging in business," including "[s]oliciting sales," performing "warranty work," and

"[m]eeting with customers or potential customers." SMC 5.30.030(B)(3)(c), (d), (*l*).

There is little question that Ford's activities fall within that broad classification. Ford does not dispute that it is in the business of making sales at wholesale. Ford also admits that it engages in activities within the Cities that are related to its business of making wholesale sales to dealers. Some of those activities are of the sorts offered as examples in the SMC. We conclude, therefore, that Ford was properly classified and taxed as one engaging in the business of wholesaling within the Cities.

Because we conclude that the taxable incident is engaging in the business of wholesaling and the challenged ordinances are clear on that point, it does not matter in which jurisdiction the actual sales at wholesale occur. Thus, Ford's argument that the terms of its contracts control the location of the sale is misdirected. As we observe hereafter, the location where title is transferred under the terms of a contract does not determine whether a city can impose a privilege tax.

Division One of the Court of Appeals has rejected an argument similar to the one Ford advances here, in the case of *General Motors,* 107 Wash.App. 42, 25 P.3d 1022. There, the court affirmed Seattle's imposition of the B & O tax presently before us on General Motors and the Chrysler Corporation, because the companies engaged in the business of making wholesale sales within Seattle. Although neither company engaged

in direct selling activities within the city, the court found that other business activities conducted by the companies "that are designed to assist the automakers in 'maintain[ing] a share of the market within the city'" were sufficient to subject them to Seattle's B & O tax. *Id.* at 48, 25 P.3d 1022 (alteration in original) (quoting SMC 5.44.022(8)).

That decision, which we declined to review, is consistent with our decisions in *General Motors Corp. v. State,* 60 Wash.2d 862, 376 P.2d 843 (1962), *aff'd on other grounds,* 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), and *Field Enterprises, Inc. v. State,* 47 Wash.2d 852, 289 P.2d 1010 (1955). In both, as here, goods were sold by out-of-state companies to Washington buyers and shipped free on board point of shipment. We upheld the imposition of the state B & O tax in both cases, reasoning that "the substance of each transaction occurs in Washington where the customer is located." *General Motors Corp.,* 60 Wash.2d at 876, 376 P.2d 843. In doing so, we rejected the argument that a contract specifying that title will transfer at a point out of state enabled the out-of-state seller to avoid the tax.

Ford cites to several cases in which courts have determined that the parties' commercial contract established where, for tax purposes, a sale is made. *See, e.g., McLeod* v. *J.E. Dilworth Co.,* 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944); *Weyerhaeuser Co. v. Dep't of Revenue,* 106 Wash.2d 557, 723 P.2d 1141 (1986). However, these cases are neither persuasive nor relevant to the question at hand because they concerned the propriety of state

and local sales taxes. Looking at the place of sale is proper in the sales tax context because the incident of tax in that situation is the individual transaction. Such is not the case where a B & O tax is involved because, as we have observed above, the B & O tax is imposed upon activities associated with the privilege of doing business in the taxing jurisdiction.

The B & O tax levied by the Cities is neither a sales tax nor a tax on the passage of title to property. Rather, the target of the tax in this instance is the privilege of engaging in the wholesale business in the Cities. Thus, we affirm the trial courts' conclusions that Ford is engaged in the business of making wholesale sales and was properly classified and taxed as such.

B. The Tax Measure

The tax measure is the amount against which the tax rate is multiplied to find the amount of tax due. The tax measure of a B & O tax on wholesaling is generally the gross proceeds of sales of tangible personal property and services rendered by the business. 1B KUNSCH ET AL., *supra,* § 72.8, at 452. As noted above, both Cities' ordinances provide that the measure of their B & O tax upon wholesalers is the "the gross proceeds of such sales of the business without regard to the place of delivery of articles, commodities or merchandise sold." SMC 5.45.050(C); *see* former TMC 6.68.220. In other words, Seattle and Tacoma tax Ford based on the gross receipts of its wholesale sales to local dealers in the respective cities.

Ford contends that this tax measure violates Washington law, the Cities' ordinances themselves, and the commerce clause of the United States Constitution. Instead, Ford would have us limit the tax measure to that portion of gross income created solely by Ford's in-city activities, such as business meetings. Ford construes the law in this area to prohibit the Cities from taxing income derived from such activities as design of vehicles, production, accepting dealer orders and receiving payments. This argument too is without merit.

1. Validity of the tax measure under Washington law

First, Ford's argument that Washington law requires the Cities to piecemeal the tax measure among all of the jurisdictions in which all of the various activities related to the sale were conducted is a clear misreading of our decision in *Lone Star Cement Corp. v. City of Seattle,* 71 Wash.2d 564, 429 P.2d 909 (1967). In *Lone Star Cement,* we struck down on equal protection and privilege and immunities grounds the City of Seattle's B & O tax assessment on an out-of-state company who had plants in both Seattle and Concrete, Washington. The city attempted to measure its B & O tax by including the gross income from sales made at the Concrete plant, even when those sales were consummated outside of Seattle and the products delivered to places outside of Seattle. We disallowed the tax assessment on the products sold in Concrete, as these sales had no connection to the company's activities in Seattle and, thus, were beyond Seattle's taxing power. We did not, however, rule that Seattle

could not tax Lone Star Cement on the entire gross receipts of sales to customers within Seattle, even when the products sold were manufactured elsewhere. In fact, Lone Star Cement paid B & O taxes on those products without protest. We only excluded from the measure of Seattle's B & O tax the revenue from products manufactured, sold, and delivered outside Seattle--revenue essentially unconnected to Seattle.

This was the same type of overreaching that the United States Supreme Court disallowed in *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272 (1939). There, the taxpayer marketed, shipped, and sold fruit in places throughout the country, including Washington State. Washington asserted that it had the authority to measure its B & O tax on all of the business's gross receipts from interstate activities, whether conducted inside or outside of Washington. The United States Supreme Court invalidated Washington's tax, because it was not apportioned to the activities within the state, but rather was impermissibly based upon the *entire volume of interstate commerce* in which the taxpayer participated.

Clearly, such is not the scenario here. By their very terms, the Cities' ordinances limit their taxing power to only those gross receipts derived from the sale of goods delivered into the Cities. This places the Cities' tax measure squarely within the boundaries allowed under *Lone Star Cement* and *Gwin, White & Prince.* The measure of tax would be invalid if it included all gross income earned by Ford

on its interstate sales or even if it included gross income derived from sales made in other areas of this state. However, that is not the case with which we are presented. In this case, the Cities properly limited their tax measure to only those sales that were connected to Ford's business activities in their respective jurisdictions.

2. Validity of the tax measure under the Cities' ordinances and tax rules

Second, the ordinances themselves are no more restrictive than Washington law requires. Ford is correct that under the terms of its own ordinances, the Cities may only measure the B & O tax based upon gross income derived from Ford's business activities in the cities. SMC 5.45.080(B) provides that the taxpayer shall allocate to the City "that portion of the taxpayer's gross income or gross proceeds of sales that are derived from business activities performed in the City." Former TMC 6.68.220(B) requires the taxpayer engaged in the business of making sales at wholesale to pay tax on an amount "equal to the gross proceeds of sales of such business."

However, Ford is not correct that the Cities have gone beyond permissible bounds in their application of the ordinances. The language Ford construes as restraining the Cities' power to reach any of Ford's interstate sales instead is merely designed to contain the measure of the tax within permissible bounds. Ford admits that it can be taxed on "income derived from activities performed within the city." Appellant's Br. of Ford Motor Co. at 20.

Revenue from sales to dealers in Seattle and Tacoma is *derived* from Ford's activities in the Cities because those activities create the opportunity for the sales.

Neither do the Cities' tax rules exclude all of Ford's interstate sales from the tax measure. Tacoma Tax Rule 103, defining where a sale is deemed to have occurred, is irrelevant in the present case, because B & O taxes do not depend upon where actual sales occur. Tacoma Tax Rule 103 (on file with Tacoma Fin. Dep't, Tax & License Div.). Another Tacoma Tax Rule, 193-A, excludes certain goods delivered to a purchaser "at a point outside the state" from wholesaling business taxes. Def.'s Ex. 28 at 769. However, this rule applies only when the goods originated in Tacoma and were sold to purchasers who were located in other cities or states. Wholesaling is considered a unitary activity occurring solely in the purchaser's jurisdiction the jurisdiction to which the goods are physically delivered. *Tyler Pipe Indus.* v. *Wash. Dep't. of Revenue,* 483 U.S. 232, 251, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987). Thus, when goods are sold by a wholesaler in Tacoma but delivered to a dealer who is outside Tacoma, the sale at wholesale is considered to have been made entirely in the dealer's jurisdiction, so Tacoma cannot tax it. Tacoma Tax Rule 193-A simply states this rule. Like the ordinances themselves, it restrains the tax measure to permissible bounds.

The dissent asserts that one of Seattle's tax rules limits the wholesaling tax to people actually selling goods within Seattle. Dissent at 5. We disagree. Seattle Business Tax Rule 5-44-194(2)(a)

provides in part: "Any person(s) who sells or leases personal property to buyers or lessees within the City are taxable under the retailing or wholesaling tax classification...." Seattle Bus. Tax Rule 5-44-194 (on file with Seattle Dep't of Executive Admin., Revenue & Consumer Affairs Div.). The words "within the City" follow the phrase "buyers or lessees," not the phrase "sells or leases," which tends to indicate that "within the City" modifies the nouns "buyers" and "lessees." If the City of Seattle instead wanted these words to modify the verb "sells," it could have phrased the rule differently, as it did in the very ordinance at issue here; in SMC 5.45.050(C), "within the City" immediately follows the verb "engaging." Thus, it would appear that Seattle Business Tax Rule 5-44-194 was not intended to limit wholesaling taxes to people who sell within Seattle, but rather, to people who sell goods to *purchasers* who are located within Seattle. Like Tacoma's tax rules, this comports with the rule that wholesaling is deemed to occur entirely within the purchaser's jurisdiction.

3. Validity of the tax measure under the commerce clause

Finally, we reach Ford's argument that the current tax measure unduly burdens interstate commerce and, thus, violates the commerce clause of the United States Constitution.[3] A state tax on interstate commerce does not violate the commerce clause so long as "the tax is applied to an activity

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[3] U.S. CONST. art. I, § 8, cl. 3

with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). If a local taxing scheme fails any one of these four requirements, it is invalid. However, it has long been recognized that it is " 'not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.' " *Gen. Motors Corp.* v. *Washington,* 377 U.S. 436, 439, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964) (quoting *W. Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 254, 58 S.Ct. 546, 82 L.Ed. 823 (1938)), *overruled on other grounds by Tyler Pipe,* 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199. Ford does not challenge that their activities within the Cities satisfy the "substantial nexus" prong of the *Complete Auto Transit* test. *See* Appellant Br. of Ford Motor Co. at 8. Thus, we address only the remaining three requirements.[4]

The fair apportionment prong ensures that each State taxes only its fair share of an interstate

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[4] The City of Seattle claims that Ford challenges the third and fourth prongs of the Complete Auto Transit test for the first time on appeal, making the challenge untimely. Ford disputes the city's allegation. We note that even if this claim is true, RAP 2.5(a) does not prevent us from reviewing these issues on appeal, but merely allows us discretion to refuse review. Because Ford did raise a commerce claim challenge below, and in the interests of fully resolving that challenge, we address the third and fourth prongs along with the second.

transaction. *Okla. Tax Comm'n* v. *Jefferson Lines, Inc.,* 514 U.S. 175, 184-85, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). The prong has two parts: the tax must be internally consistent and externally consistent. "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Id.* at 185, 115 S.Ct. 1331. External consistency depends on the practical effect of a tax, existing where a tax is economically justified, such that it does not "reach[ ] beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Id.* Where a state tax (or local tax, as here) creates "the threat of real multiple taxation (though not by literally identical statutes)," the tax is externally inconsistent. *Id.* Ford contends that the Cities' B & O tax, as applied to Ford, is not fairly apportioned because it violates both the internal and external consistency tests.

The Cities point out that this challenge has been settled previously and adversely to Ford. The Cities are correct. In *General Motors,* 107 Wash. App. at 55-60, 25 P.3d 1022, the Court of Appeals, Division One, explicitly held that Seattle's B & O tax is fairly apportioned. The Court of Appeals determined that Seattle's B & O tax on wholesaling is internally consistent because the measure of the tax includes only wholesale sales of goods delivered to Seattle, thereby preventing the possibility that the out-of-state automakers could be subjected to the identical tax in another state for the same vehicles and parts. The court also determined that Seattle's B

& O tax was externally consistent because there was no evident danger of multiple taxation by outside jurisdictions and because a tax on the gross receipts of wholesaling activities is inherently apportioned. In reaching this conclusion, the court relied on the United States Supreme Court's decision in *Tyler Pipe,* 483 U.S. 232, 107 S.Ct. 2810.

In *Tyler Pipe,* the United States Supreme Court rejected appellant Tyler Pipe's apportionment challenge to Washington State's B & O tax, concluding that "the activity of wholesaling-whether by an in-state or an out-of-state manufacturer--must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Tyler Pipe,* 483 U.S. at 251, 107 S.Ct. 2810. The Court noted that Washington's B & O tax on interstate sales by out-of-state manufacturers, which is measured by the gross proceeds of sales to Washington buyers, was "'apportioned exactly to the activities taxed'" even though part of the value of the wholesale transaction was "attributable to manufacturing activity carried on in another State." *Id.* (quoting in part *Standard Pressed Steel Co.* v. *Dep't of Revenue,* 419 U.S. 560, 564, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975)).

The Cities' wholesale B & O taxes are very similar in the relevant aspects to the state statute at issue in *Tyler Pipe.* The Cities' privilege tax is measured by the gross proceeds of all sales to buyers within the taxing jurisdiction. Sales at wholesale to these buyers is an activity separate from manufacturing, design, and the like, which under *Tyler Pipe* must be considered conducted entirely

within the destination city. Because of this, no other state or jurisdiction within Washington can tax it. Ford faces no practical threat of multiple taxation due to the Cities' B & O taxes, so the ordinances are externally consistent. Even if the same ordinance were put into effect in every city across the nation, Ford would face no additional taxation as a result of being engaged in interstate commerce, so the ordinances are internally consistent. We conclude that the Cities' B & O taxes on wholesaling are, like the virtually identical Washington State statute, apportioned exactly to the activities taxed.

Ford relies primarily on a California case, a Pennsylvania Supreme Court case, and the United States Supreme Court's decision in *Jefferson Lines* to support its apportionment challenge. However, we find none of these cases persuasive.

In *General Motors Corp. v. City of Los Angeles,* 5 Cal.3d 229, 95 Cal.Rptr. 635, 486 P.2d 163 (1971), the California Supreme Court applied California constitutional provisions and the equal protection clause of the federal constitution to business privilege taxes on products manufactured and sold within the state of California. Since interstate commerce was not involved, the court was not required to examine the validity of the gross receipts tax under the commerce clause of the United States Constitution. Thus, the California holding is inapplicable in the instant case.

The Pennsylvania case actually contradicts Ford's argument. While the Pennsylvania Supreme Court did limit the reach of Philadelphia's business

privilege tax on *services* to receipts from services performed in the city, it recognized and emphasized that in levying a gross receipts tax on activities involving *manufacturing and sales,* "the state of origin can tax the manufacturing activity, and the state of destination can tax the selling activity," without requiring apportionment. *Phila. Eagles Football Club, Inc. v. City of Philadelphia,* 573 Pa. 189, 823 A.2d 108, 129 (2003).

Finally, this court has previously rejected the argument that *Jefferson Lines* somehow required us to revisit and overturn *Tyler Pipe's* holding. *W.R. Grace & Co. v. Dep't of Revenue,* 137 Wash.2d 580, 597, 973 P.2d 1011 (1999). In *W.R. Grace,* we reaffirmed that the measure of our state's B & O tax on engaging in wholesaling activities is fairly apportioned and constitutional. In sum, none of the cases relied upon by Ford put into doubt Seattle's constitutional ability to measure its tax by the entire gross proceeds of sales to dealers located in Seattle.

A tax violates the third prong of the *Complete Auto Transit* test only if it treats interstate and intrastate commerce differently. *Chi. Bridge & Iron Co. v. Dep't of Revenue,* 98 Wash.2d 814, 830, 659 P.2d 463 (1983). Ford argues the Cities' B & O taxes are discriminatory because they are not fairly apportioned. This argument fails for two reasons. First, we have already determined that the Cities' B & O tax schemes do not run afoul of *Complete Auto Transit's* fair apportionment requirement. Second, Ford confuses the third prong of the test with the second. The antidiscrimination prong is not about apportionment, but rather about whether a

transaction is taxed more heavily because it crosses state lines.

The taxpayers in *Chicago Bridge & Iron* raised a third prong challenge to the State's B & O tax. We rejected their argument, noting that Washington's tax scheme treats interstate and intrastate business equally, making no distinction between them. We concluded that under the state statute, both in-state and out-of-state wholesalers are taxed only once on their gross proceeds based on sales made within Washington.

So it is with the Cities' B & O tax scheme. The Cities' tax scheme only taxes the gross proceeds derived from sales made and delivered to their respective jurisdictions. Their tax measure includes receipts from all products delivered into the jurisdiction, regardless of the place of origin. The fact that Ford may be taxed on manufacturing by the State where its products are manufactured, as well as taxed by Washington State and one of the Cities, does not constitute discrimination against interstate commerce and does not present grounds for this court to declare the Cities' B & O tax scheme unconstitutional. *Accord Am. Nat'l Can Corp. v. Dep't of Revenue,* 114 Wash.2d 236, 241-46, 787 P.2d 545 (1990). We find that, like Washington State, the Cities impose their B & O wholesaling taxes equally upon interstate and intrastate business, making no distinction between them.

A tax violates the fourth prong of the *Complete Auto Transit* test only if the measure of the tax "bears no relationship to the taxpayers'

presence or activities in a State." *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609, 629, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). We noted in *Chicago Bridge & Iron* that this prong "is easily met." *Chi. Bridge & Iron,* 98 Wash.2d at 832, 659 P.2d 463. This fourth requirement "does not address the rate or amount of the tax." *Id.* Nor does it require, as Ford asserts, that we compare the actual value of the services provided by the Cities with the income taxed. Instead, the fourth prong is tied to the first, nexus, and requires that the tax measure, as well as the tax incident, be "'tied to the earnings which the State ... has made possible.'" *Id.* (quoting *Commonwealth Edison,* 453 U.S. at 626, 101 S.Ct. 2946 (quoting *Wisconsin* v. *J.C. Penney Co.,* 311 U.S. 435, 446, 61 S.Ct. 246, 85 L.Ed. 267 (1940))).

In *Chicago Bridge & Iron,* we concluded that although the taxpayer formalized its construction contracts outside the state, its presence and activities in Washington were fairly related to the services provided by the State. In reaching our decision, we looked at the taxpayer's specific activities in Washington, such as maintaining an office and selling products to consumers here, and at the services provided by the State broadly, such as "police and fire protection, the presence of a trained work force, and the general 'advantages [accorded to the taxpayer] of a civilized society." *Chi. Bridge & Iron,* 98 Wash.2d at 832, 659 P.2d 463 (quoting *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 445, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979)).

This prong is also easily satisfied in this case. In addition to Ford's meetings with its dealers

within the limits of the Cities, Ford's presence in the Cities allows for its products to be delivered to, marketed, and sold in the Cities--activities that clearly bear a relationship to the gross proceeds it receives from area dealers. Furthermore, as in *Chicago Bridge & Iron,* the Cities more broadly provide Ford with an orderly and civilized place to conduct its business activities.

In sum, there is no authority that supports Ford's assertion that the tax measure imposed on the activity of wholesaling must be broken down and apportioned to the places where each discrete step in the wholesaling process is conducted. Both Washington law and holdings of the United States Supreme Court treat wholesaling as a single, unitary activity, separate from the manufacturing and design processes. Accordingly, a long line of precedent sanctions using the gross proceeds from wholesale sales delivered into a jurisdiction as the measure of a B & O tax, when the taxpayer is engaged in the business of fostering wholesale sales within the taxing jurisdiction. The Cities' B & O tax measure is in accordance with this jurisprudence. Furthermore, because the Cities' B & O tax scheme meets all four requirements of the *Complete Auto Transit* test, we find that it does not violate the federal commerce clause. The fact that some portions of the wholesaling process take place outside of the taxing jurisdiction is not controlling and does not, as Ford asserts, require the Cities to exclude such activities from the tax measure.

III

Ford also challenges the City of Tacoma's assessment of taxes from 1994 through 1999, claiming it is barred by the statute of limitations. Ford claims, additionally, that it was never properly assessed. We reject both of these claims.

Tacoma assessed Ford in 2004. At that time, Tacoma's statute of limitations prohibited collection of taxes "more than four years after the close of the calendar year in which they were due." Former TMC 6.01.090(3) (2002).[5] However, the same ordinance provided two exceptions to the four-year limitation: (1) when a taxpayer was not registered to do business in the city at the time of assessment and (2) when a taxpayer had not filed a tax return for the periods at issue. In either of these cases, taxes could be collected for the 10 years prior.

It is not disputed that Ford was registered at the time the assessment was issued in 2004. Thus, only the second exception is at issue here. The TMC does not define what constitutes a tax return. State

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[5] In relevant part, former TMC 6.01.090(3) provides:

> "(3) The Director shall not assess ... additional taxes ... due more than four years after the close of the calendar year in which they were due, except ...;
>
> "(a) Against a person who is not currently registered or has not filed a tax return as required by this chapter for taxes due within the period commencing ten years prior to the close of the calendar year in which the person was contacted in writing by the Director...."

law defines a tax return as "a tax or information return ... required by, or provided for or permitted under, the laws of this state which is filed with the department of revenue." RCW 82.32.330(1)(b). Federal courts have interpreted a tax return to be a document that "contains financial data, ... which would allow for a computation" of the appropriate tax. *Hess v. United States*, 785 F. Supp. 137, 138 (E.D. Wash. 1991) (citing *United States v. Long*, 618 F.2d 74 (9th Cir.1980)).

Ford acknowledges it did not file a formal tax return. However, Ford argues that because it registered as a business in 2000 and back-paid the license fees for the years 1994-1999 at that time, it filed a return for those years. Essentially, Ford asks us to consider its business license applications to constitute tax return, because the applications require a minimal amount of financial data and payment of a fee.

Ford's argument fails for three reasons. First, the annual business license application is exactly that--a license application, not a return. It is designed to license a company to engage in business, not to provide financial information for taxation purposes. Second, although the license applications may request some financial data, they do not require the provision of sufficient financial data to allow for a computation of the appropriate tax. Third, even if the license applications could be considered returns, Ford failed to file them until 2000. Had Ford filed them in the years they were

due, Tacoma might have known to request tax returns and payment of taxes at that time. However, Ford failed to provide such notice of its business activities in a timely manner. Its belated filing of license applications cannot now be used to avoid paying its fair share of the tax burden to Tacoma. We affirm the trial court's conclusion that Ford did not file valid tax returns for the 1994-1999 tax period, allowing the City of Tacoma to collect taxes owed for those years.

Ford goes on to allege that it was not properly assessed. Generally, when a tax assessment is challenged, courts will presume that the assessor has performed his or her duties properly and fairly and require the taxpayer to shoulder the burden of proving otherwise. 72 AM.JUR.2D State and Local Taxation § 637 (2001); *Nathan v. Spokane County*, 35 Wash. 26, 34, 76 P. 521 (1904). We give great deference to the trial court's weighing of evidence. Our review, in such cases, "is limited to determining whether substantial evidence supports the findings" and conclusions of the trial court. *Org. to Pres. Agric. Lands v. Adams County*, 128 Wash.2d 869, 882, 913 P.2d 793 (1996) (citing *Ridgeview Props. v. Starbuck*, 96 Wash.2d 716, 719, 638 P.2d 1231 (1982)). "'Substantial evidence' exists when there is a sufficient quantum of proof to support the trial court's findings of fact." *Id.* (quoting *In re Sego*, 82 Wash.2d 736, 739-40, 513 P.2d 831 (1973)).

The Pierce County Superior Court concluded that Ford failed to meet its burden of proof on this

challenge, finding the two field reports issued by Tacoma in April 2004 to have been valid tax assessments. There is evidence to support the superior court's conclusion on this issue. The field reports were mailed to Ford, identified the years for which tax was due, and stated the specific amount owing. The reports evidently provided adequate notice to Ford of its obligations, since Ford subsequently paid the assessed amount and filed a lawsuit challenging it. Furthermore, the superior court heard evidence of the City of Tacoma's procedures in assessing taxes, the degree to which the reports given complied with their usual form of notice, and computer issues the city was having at that time. We will not engage in a reweighing of this evidence, particularly in light of the fact that the Ninth Circuit Court of Appeals has previously concluded, "The form on which a notice of assessment and demand for payment is made is irrelevant as long as it provides the taxpayer with all the information required," providing adequate notice that taxes are due. *Elias v. Connett*, 908 F.2d 521, 525 (9th Cir. 1990); *see also Hughes v. United States*, 953 F.2d 531, 536 (9th Cir. 1992).

Similarly, we will not reweigh the evidence on the authority of the auditor to make the assessment, as Ford asks us to do. The superior court concluded that the auditor who conducted Ford's audit was acting under the authority of the director of finance. The TMC provides that the director of finance shall audit and assess the taxpayer. *See, e.g.*, former TMC 6.01.090(3). It also provides that the term "[d]irector" means the director of finance or any city officer

designated by him to act on his behalf. Former TMC 6.68.023 (1991). The trial court determined that the senior auditor who carried out the audit was acting as a duly authorized designee of the director of finance. This finding is supported by the record.

IV

The B & O tax levied by the Cities is neither a sales tax nor a tax on the passage of title to property. Rather, its tax incident is engaging in the wholesale business in the cities of Seattle and Tacoma. Ford's activities conducted in the Cities fall within this definition. Thus, we affirm the trial courts' conclusions that Ford is engaged in the business of making wholesale sales and was properly classified and taxed as such.

Ford's apportionment and commerce clause challenges to the measure of the B & O tax are governed by settled Washington and United States Supreme Court law. A long line of precedent upholds the gross proceeds of sales at wholesale that derive from activities within the taxing jurisdiction as a valid and constitutional measure for a B & O tax on wholesaling. Ford does not present sufficient grounds for departing from the reasoning and application of those opinions. Thus, we also affirm the trial courts' conclusions that the measure of the Cities' B & O tax is fairly apportioned and does not violate the federal commerce clause.

Finally, we find the Pierce County Superior Court's challenged findings of fact and conclusions of law to be supported by substantial evidence. We

uphold its determination that Tacoma's assessment was valid and Tacoma may collect B & O taxes from the 1994-1999 period.

Accordingly, we affirm both trial courts.

WE CONCUR: SUSAN OWENS, BARBARA A. MADSEN, MARY E. FAIRHURST and BOBBE J. BRIDGE, JJ.

SANDERS, J. (dissenting).

Today's holding allows City of Seattle and City of Tacoma to reach two thousand miles beyond their borders to tax automobile sales made in Dearborn, Michigan. Ford admits it engages in some business activities in both Seattle and Tacoma, however, argues it is beyond either city's taxing power to tax sales completed outside their jurisdictions.

Title, ownership, and possession of all Ford's vehicles transfer to the local dealerships when Ford delivers the vehicles to a common carrier at its factory in Michigan. The majority conveniently ignores this fact, claiming it is only necessary to find Ford engaged in some business activities here. I disagree. We must follow the plain meaning of both cities' taxing ordinances to hold sales in Michigan are not taxable under these ordinances, although other business activity which occurs within the municipal jurisdictions may be. Moreover any attempt by a municipality to tax an out-of-state sale would violate the commerce clause.

I. The cities' ordinances do not allow taxation of out-of-state sales

Both cities have a tax scheme that provides different tax rates based upon different activities. Two classifications possibly apply: Seattle Municipal Code (SMC) 5.45.050(C) and former Tacoma Municipal Code (TMC) 6.68.220(B) (1998) applied to every person in the business of making sales at wholesale within the city[1] while SMC 5.45.050(F) and former TMC 6.68.220(F) are catch-all subsections that applied to all other activities not specifically listed in the respective ordinance. The majority claims the former classification applies. But this section applies to wholesale sales made only *within the city.* Both cities define a sale as transferring property's ownership or title for valuable consideration. SMC 5.30.050; former TMC 6.68.050 (1978).[2]

We apply the same rules of statutory construction to ordinances as we do statutes. *Kitsap*

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[1] In addition to SMC 5.45.050 and former TMC 6.68.220, former SMC 5.44.400 (1996) applied before 2002, though there is no material difference between the ordinances for our purposes.

[2] Additionally, Seattle defines a sale as transferring possession of property for valuable consideration. SMC 5.30.050. Before January 1, 2002, however, Seattle defined a sale as "the exchange of property as well as the sale thereof for money ... and any other contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price." Former SMC 5.44.026(1) (1996). According to all relevant definitions of sale, Ford sold the vehicles to local dealerships in Michigan.

County v. Mattress Outlet, 153 Wash.2d 506, 509, 104 P.3d 1280 (2005). And unambiguous ordinances must be applied by their plain meaning. *State v. Villarreal,* 97 Wash. App. 636, 641-42, 984 P.2d 1064 (1999). There is nothing ambiguous about these ordinances. Seattle and Tacoma both seek to tax Ford's wholesale sales, but these sales occurred outside both cities. A sale occurs where delivery takes place: "a sale takes place in this city when the goods sold are delivered to the buyer in this city...." Clerk's Papers (CP) (Tacoma) at 767 (Tacoma Tax Rule 103, Def.'s Ex. 28); *see also* WAC 458-20-103. To determine where delivery occurs we must look to the parties' contract and the relevant statutory law.

According to the contract, title is transferred when Ford delivers the vehicles to a carrier in Michigan. "'Delivery' means the act of transferring possession of tangible personal property." CP (Seattle) at 112 (Seattle Business Tax Rule 5-44-193A(2)(c)); *see also* CP (Tacoma) at 769 (Tacoma Tax Rule 193-A, Def.'s Ex. 29);[3] *see also* U.C.C. § 2-103(e) (2004) (defining delivery as "the voluntary transfer of physical possession or control of goods"). Ford's shipment contract specified the vehicles were released at the gate when they were transferred to

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[3] Delivery "includes among others the transfer of goods from consignor to freight forwarder or for-hire carrier, from freight forwarder to for-hire carrier, from one for-hire carrier to another, or from the for-hire carrier to consignee." Seattle Business Tax Rule 5-44-193A(2)(c); see also CP (Tacoma) at 769 (Tacoma Tax Rule 193-A). Therefore, Ford completed delivery to the dealerships when it transferred the vehicles to a for-hire carrier.

the carrier. This is a standard F.O.B. (free on board) point of shipment contract. Under RCW 62A.2-504, goods are delivered when the seller ships the goods. Specifically, the seller must:

> (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and
>
> (b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and
>
> (c) promptly notify the buyer of the shipment.

Id.; U.C.C. § 2-504 cmt. 1 ("The general principles embodied in this section cover the special cases of F.O.B. point of shipment contracts ...."); *see also* RCW 62A.2-308 (unless otherwise specified "the place for delivery of goods is the seller's place of business"). These requirements were met in Michigan when vehicles were sent to "Gate Release." CP (Tacoma) at 106-07 (Stipulation of Facts). Once building and testing is complete, a third party carrier inspects the vehicles, then transports them from the factory to a "drop zone," where Ford scans and releases each vehicle at exit ("Gate Release"). *Id.*

At gate release, Ford transfers title to the dealer, retaining only a security interest in the vehicle until full payment is made. *Id.* At that point Ford has voluntarily transferred physical possession of the goods; delivery has been made, and Ford is no longer responsible for the goods.[4]

While the majority disregards these facts and claims Ford is asking us to construe these ordinances narrowly, majority at 189, Ford is only asking we apply their plain meaning. "Any doubts as to the meaning of a statute under which a tax is sought to be imposed will be 'construed against the taxing power.'" *Weyerhaeuser Co. v. Dep't of Revenue,* 106 Wash.2d 557, 566, 723 P.2d 1141 (1986) (quoting *Duwamish Warehouse Co. v. Hoppe,* 102 Wash.2d 249, 254, 684 P.2d 703 (1984); *MAC Amusement Co. v. Dep't of Revenue,* 95 Wash.2d 963, 966, 633 P.2d 68 (1981)). The majority reads the cities' ordinances to allow a city to tax any business that engages in any activity that eventually leads to making sales, even when those sales occur outside the city. Majority at 189.

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[4] Seattle suggests Ford was still responsible because a buyer could reject the goods at its store in the city. This statement confuses two issues. Under RCW 62A.2-509(1)(a) "the risk of loss passes to the buyer when the goods are duly delivered to the carrier." If damage occurred during transit, Ford was not primarily liable. Of course, the perfect tender rule still applied; if Ford's shipments did not conform to the contract, then the dealership could have rejected the goods. This does not implicate Ford's delivery of the vehicles-that clearly occurred in Michigan.

The majority also ignores the cities' own rules. "Aside from the constitutional limitations of the State's power to tax, [a city] is bound by the explicit provisions of its own rules." *City of Tacoma v. Gen'l Metals of Tacoma, Inc.*, 84 Wash.2d 560, 564, 527 P.2d 1314 (1974). Tacoma Tax Rule 193-A provides: "Where the seller agrees to and does deliver the goods to the purchaser at a point outside the state, neither Retailing nor Wholesaling business tax is applicable."[5] CP (Tacoma) at 769; *see also* CP (Tacoma) at 767 (Tacoma Tax Rule 103) ("For the purpose of determining tax liability ... a sale takes place in this city when the goods sold are delivered to the buyer in this city ...."); *see also* WAC 458-20-103 ("For the purpose of determining tax liability ... a sale takes place in this state when the goods sold are delivered to the buyer in this state...."). Additionally, Seattle Business Tax Rule 5-44-194 provides "Any person(s) *who sells* or leases personal property to buyers or lessees *within the City* are taxable under the retailing or wholesaling tax classification...." CP (Seattle) at 120. Ford never sold any vehicles within Seattle and should not be taxed under the wholesaling tax classification.

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[5] In its Petition for Review, Ford neglects to inform this Court the relevant language is found in Tacoma Tax Rule 193-A, which applies to "SALES OF GOODS ORIGINATING IN TACOMA TO PERSONS IN OTHER STATES, CITIES, AND COUNTIES." CP (Tacoma) at 769. Nevertheless, the language evidences Tacoma's limitations on taxing goods delivered beyond its border. Additionally, part A provides that the place of delivery is determined by the parties' contract and when a common carrier takes charge of the goods.

The majority relies on a Court of Appeals decision in *General Motors Corp. v. City of Seattle,* 107 Wash.App. 42, 25 P.3d 1022 (2001) for support. But there General Motors (GM) and Chrysler argued "they [did] not engage in business activities." *Id.* at 48, 25 P.3d 1022. And here Ford wisely admits it did engage in business activities. GM and Chrysler, like Ford, also shipped the vehicles "fob factory via common carrier." *Id.* at 46, 25 P.3d 1022 (footnote omitted). The *General Motors* court found there was a sufficient nexus between the companies' activities in Washington and the B & O tax. *Id.* at 53, 25 P.3d 1022. But because neither GM nor Chrysler made sales in Seattle, the court said: "Although they may not be characterized as direct selling activities, they nevertheless constitute 'other business activities'...." *Id.* at 48, 25 P.3d 1022. Similarly, Ford's "other business activities" may be taxed, but sales made in Michigan are beyond the purview of either city's taxing power.

II. Taxing out-of-state sales violates the commerce clause

The commerce clause grants the United States Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The negative implication of this power prohibits a state (or city) from passing legislation that improperly burdens interstate commerce. *Okla. Tax Comm'n v. Jefferson Lines,* 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) ("[W]e have consistently held [the commerce clause] to contain a further, negative command, known as the dormant

Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject."). Therefore, a local tax is valid only "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

Each city's tax is measured by gross proceeds of out-of-state sales and therefore does not apportion the activities taxed. *See Standard Pressed Steel Co.* v. *Dep't of Revenue,* 419 U.S. 560, 564, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975); *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434, 440, 59 S.Ct. 325, 83 L.Ed. 272 (1939) ("Although the tax, measured by gross receipts, to some extent burdened the commerce, it was held that the burden did not infringe the commerce clause. Since it was apportioned exactly to the activities taxed, all of which were intrastate, the tax was fairly measured by the value of the local privilege or franchise."). No matter the trigger--be it engaging in business activities leading to making sales or making the sales themselves--each city nevertheless is not apportioning its respective tax between activity inside its jurisdiction and activity outside. Rather, each city is taxing 100 percent of sales that occur outside its jurisdiction in violation of the commerce clause. *ASARCO, Inc.* v. *Idaho State Tax Comm'n,* 458 U.S. 307, 315, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982) ("As a general principle, a State may not tax value earned outside its borders.").

In *Tyler Pipe,* the United States Supreme Court found "the activities of Tyler's sales representatives adequately support the State's jurisdiction to impose its wholesale tax on Tyler." *Tyler Pipe Indus., Inc.* v. *Wash. State Dep't of Revenue,* 483 U.S. 232, 251, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987). But unlike Ford, Tyler Pipe sold its products in Washington. And while Tyler Pipe's activities could be taxed, the Court was careful to note the constitutional limitations on imposing a wholesale tax:

> Thus, the activity of wholesaling--whether by an in-state or an out-of-state manufacturer-must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax.

Id. at 251, 107 S.Ct. 2810. Clearly, Ford's wholesaling activities were not conducted wholly within Washington; its vehicles were sold in Michigan-title, ownership, and possession are transferred when Ford delivers the vehicles to a common carrier at its factory in Michigan.

The cities' tax on sales made in Michigan also burdens interstate commerce because of the threat of double taxation. The Supreme Court has said there is a risk of double taxation "whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed." *Jefferson Lines,* 514 U.S. at 184, 115 S.Ct. 1331. For example, the Supreme Court has found that when "[a] substantial part of [the taxed activity]

is outside the state ..., the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state...." *Gwin, White,* 305 U.S. at 438, 59 S.Ct. 325; *see also Gen. Motors Corp. v. City of Los Angeles,* 5 Cal.3d 229, 241, 95 Cal.Rptr. 635, 486 P.2d 163, 171 (1971) ("The gross receipts arising from this category of transactions must be apportioned in a manner which fairly reflects the proportion of in-city to out-of-city selling activities.").

Here the vehicles were made and sold in Dearborn, Michigan. Michigan may tax these sales. *Jefferson Lines,* 514 U.S. at 184, 115 S.Ct. 1331 ("It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State."). Consequently, when cities in Washington tax these sales it impermissibly burdens interstate commerce.

While Ford engages in some business activities within Seattle and Tacoma, its vehicles were sold in Michigan. Under the plain meaning of both cities' ordinances, neither Seattle nor Tacoma is allowed to tax sales in Michigan. Furthermore, allowing this tax clearly violates the dormant commerce clause as it taxes extraterritorial activities and threatens double taxation.

I dissent.

WE CONCUR: TOM CHAMBERS, CHARLES W. JOHNSON and JAMES M. JOHNSON, JJ.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

FORD MOTOR COMPANY,	)	
	)	ORDER
Appellant,	)	DENYING
	)	MOTION
v.	)	FOR
	)	RECONSIDERATION
CITY OF SEATTLE,	)	
EXECUTIVE SERVICES	)	
DEPARTMENT,	)	NO. 77167-7
	)	(consol w/ 77516-8)
Respondent.	)	
	)	
----------)		
	)	
FORD MOTOR COMPANY,	)	
Appellant,	)	
	)	
v.	)	
	)	
CITY OF TACOMA,	)	
Respondent.	)	
_____)		

The Court having considered the Appellant's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Appellant's Ford's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 6th day of August, 2007.

For the Court

CHIEF JUSTICE

APPENDIX C

THE HONORABLE RICHARD JONES
Hearing Date: May 6, 2005
9:00 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

FORD MOTOR COMPANY,	)	
	)	No. 03-2-38146-2SEA
Plaintiff,	)	
vs.	)	ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
CITY OF SEATTLE, DEPARTMENT OF DEPARTMENT, EXECUTIVE SERVICES	)	
Defendant.	)	

This matter came on for consideration pursuant to Defendants' Motion for Partial Summary Judgment. The Court has considered the arguments of counsel and the following documents on file herein:

1. Defendant's Motion for Partial Summary Judgment

2. Declaration Kent Meyer with attached Exhibits A through P

3. Plaintiff's Response to Motion for Partial Summary Judgment

4. Affidavit of Scott Edwards with attached Exhibits SE-1 through SE-9

5. Affidavit of Christopher Mucke with attached Exhibits CM-1 through CM-14

6. Affidavit of Jeffrey Marentic with attached Exhibit JM

7. Affidavit of Ricky Coley with attached Exhibits RC-1 through RC-4

8. Affidavit of Brandi Henry-Exarhos

9. Affidavit of Mary Beth Overmyer

10. Affidavit of Eric Watson with attached Exhibit EW-1

11. Affidavit of Karen Howlett

12. Affidavit of Thomas Eastman

13. Affidavit of Larry Tarnacki

14. Defendants' Reply in Support of Motion for Partial Summary Judgment with attached excerpts from deposition of Mel McDonald

Now therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants' Motion for Partial Summary Judgment is GRANTED and that Plaintiff's claims in its Second Amended Complaint are dismissed with prejudice except that Claim IV, paragraph 33 and Claim V are not dismissed by this order; and the Court further finds,

That this order effectively determines this action and final judgment shall be entered in favor of the City on the claims dismissed by the City's motion. There is no reason for delay of the entry of final judgment or appeal of the issues raised in the motion. An immediate appeal will conserve judicial and party resources by allowing for the resolution of the primary issues in this action. The May 23, 2005 trial date is stricken and action on the remaining claims is stayed pending exhaustion of any appeals.

DATED this 6 day of May, 2005.

_____
HONORABLE RICHARD JONES

Presented by:

THOMAS A. CARR
Seattle City Attorney

By _____
Kent C. Meyer, WSBA # 17245
Assistant City Attorney
Attorneys for Defendant City of Seattle,
Department of Executive Administration

Approved. as to form:

PERKINS COIE LLP

By _____
Scott M. Edwards, WSBA # 26455
Attorneys for Plaintiff Ford Motor Co.

APPENDIX D

Honorable Kathryn J. Nelson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

FORD MOTOR COMPANY, Plaintiff, v. CITY OF TACOMA, Defendant.	No. 04-2-08497-6 FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

THIS MATTER having come on for trial before the Court on the 9th day of June, 2005, the plaintiff appearing by and through its counsel, Scott M. Edwards of PERKINS COIE, LLP, and James C. Owen, appearing Pro Hac Vice, and the City of Tacoma appearing by and through its counsel, Kari L. Sand, Assistant City Attorney, and Cheryl F. Carlson, Assistant City Attorney; and the Court having considered the Stipulation of Facts, Exhibits 1 through 50 admitted into evidence, the testimony of Steve Marcotte, the trial briefs submitted by the parties and the

arguments of counsel; and the Court being fully advised makes and enters the following:

FINDINGS OF FACT

1. The City of Tacoma ("City") is a municipal corporation organized and operating under the laws of the State of Washington.

2. Ford Motor Company is a Delaware Corporation, registered to do business in the State of Washington, with its principal place of business in Dearborn, Michigan.

3. The parties' Stipulation of Facts dated June 9, 2005 is hereby incorporated by reference.

4. This action arises from the City's imposition of Business and Occupation ("B & O") taxes, interest and penalties for the period of January 1, 1990 through December 31, 1999 and additional B & O taxes, interest and penalties for the period of January 1, 2000 through December 31, 2002 (collectively the "audit period") in the total amount of $1,307,933.83 as contained in, and reflected by, two Field Auditor's Reports mailed to Ford on or about April 21, 2004. (Defense Trial Exhibits 22 and 23.)

5. The Field Auditor's Reports were not accompanied by a Notice of Assessment. Issues with the City's new computer system prevented automated production of a formal notice of assessment. The City's Finance Director testified that nothing prevented the City from manually preparing a Notice of Assessment for Ford.

6. Ford appealed Tacoma's imposition of B & O tax for the audit period claiming that the additional tax: (a) is barred for the period of 1994 through 1999 by statute of limitations; (b) is based on an improper classification of Ford's activities conducted within Tacoma; (c) fails to provide applicable deductions for amounts on which eligible gross receipts taxes were paid to another jurisdiction; (d) additional tax imposed under the service classification was improperly imposed on amounts that were not gross income of Ford; (e) for the period 2000 through 2002 additional tax imposed under the classification for making sales at wholesale was based on estimates that overstated Ford's gross income from Tacoma dealers; and (f) tax was imposed on income derived from activities conducted outside the City of Tacoma in violation of the plain language of the Code as well as Washington law. Ford also claims that using gross income from Tacoma dealers to measure tax under the classification for making sales at wholesale violates the U.S. Constitution because it does not apportion the tax base to reflect the contribution of activities performed outside the City and is not fairly related to services provided by Tacoma. The parties reached agreement prior to trial on Ford's claims identified in items (c), (d), and (e), above. These claims were not tried to the court.

7. Former TMC 6.68.050 was in effect during the audit period, and former TMC 6.01.090(3) was in effect when the Field Auditor's Reports were mailed.

8. Ford signed statute of limitations waivers in 2000 and 2001 for the 1990 and 1991 tax

years. Ford signed statute of limitations waivers in 2002 and 2003 for the 1992 and 1993 tax years, respectively. (Defense Trial Exhibit 21, Bates Nos. 00277-00279.) Ford does not assert a statute of limitations defense with respect to the City's imposition of tax for the years 1990 through 1993.

9. Ford does not assert a statute of limitations defense with respect to the City's imposition of tax for the years 2000 through 2003.

10. Former TMC 6.68.050, in effect during the audit period, defined "sale," in relevant part, as "any transfer of the ownership of or title to property for a valuable consideration ...."

11. Tacoma Tax Rule 103, in effect during the audit period, provides, in relevant part, "... For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in [Tacoma] when the goods sold are delivered to the buyer in [Tacoma], irrespective of whether title to the goods. passes to the buyer at a point within or without [Tacoma]."

12. Former TMC Section 6.68.075(1)(a), in effect during the audit period, provides, in relevant part, as follows:

> A taxpayer that has paid an eligible gross receipts tax with respect to a sale of goods or services to a jurisdiction in which the goods are delivered or the services are provided may deduct an amount equal to the gross receipts used to measure that tax from the measure of the tax owed to the City.

13. Any Finding of Fact set forth hereinabove which may be deemed to be a Conclusion of Law is hereby adopted as such.

From the foregoing Findings of Fact, the Court does make the following:

CONCLUSIONS OF LAW

1. This court has jurisdiction over this tax dispute pursuant to Section 6, article IV of the state constitution.

2. A taxpayer challenging a tax assessment bears the burden of demonstrating that the taxing authority's action is in error.

3. The Field Auditor's Reports issued by Tacoma on or about April 24, 2004 constitute tax assessments, notwithstanding the omission of any notice of assessment.

4. When Senior Auditor Jerry Wheeler first contacted Ford in writing in December 1989, Mr. Wheeler was acting as the duly authorized designee of the Director of Finance. Ford was not registered at the time of Mr. Wheeler's first contact.

5. Tacoma's assessments were timely. At the time the assessments were issued, valid waivers were in place for assessment of the years 1990 through 1993.

6. Former TMC 6.01.090(3) authorized a ten-year limitations period for taxpayers who, among other reasons, failed to file a return for taxes due within a period commencing ten years prior to the

taxpayer having been first contacted in writing by the Director of Finance or designee. Since Ford had not filed any returns for the ten-year period prior to being contacted in writing by the Director's designee in December of 1999, and was unregistered when tax returns for those years were due, Tacoma's assessment for the years 1994 through 1999 was timely under former TMC 6.01.090(3).

7. The assessments for the years 2000 through 2003 were within the four year limitation period of TMC 6.01.090(3).

8. Ford's proffered. construction of the statute of limitations provision of Tacoma's Code is contrary to the plain language of the Code.

9. Tacoma's definition of "engaging in business," set out in former TMC § 6.68.130 is broad, and encompasses all activities engaged in by Ford relating to its sales of vehicles and parts to dealers located in Tacoma.

10. For B & O tax purposes, the City of Tacoma, in administering its code, can define what it means by making sales at wholesale, and it has done so. Tacoma's Tax Rules 103 and 193-B clearly state that Tacoma is the place of sale for its B & O tax purposes.

11. Ford's argument, that the place of sale is determined by the passage of ownership and title in accordance with the terms of Ford's contracts with the dealers and commercial law, is not a reasonable construction of the applicable law. Neither the Uniform Commercial Code nor shipping terms, such

as f.o.b. factory, control the tax consequences of a wholesale transaction. Washington Department of Revenue Det. No. 98-146, 18 WTD 175 (1999) and Washington Department of Revenue Det. No. 99-216E, 18 WTD 264 (1999). Thus, for purposes of Tacoma's B & O tax, neither the terms of Ford's agreements with dealers nor the terms of shipping or insurance contracts determine the place of sale for Tacoma's tax purposes. Ford's reliance on the U.S. Supreme Court decisions *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304 (1944) and *McGoldrick* v. *Berwind-White Coal Company*, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (1940) in which the taxing jurisdiction's authority to impose tax was determined by the delivery terms in the parties sales contracts is misplaced as is Ford's reliance on *Weyerhaeuser Co. v. Dep't of Revenue*, 106 Wn.2d 557, 562-63, 723 P.2d 1141 (1986). Those cases are inapplicable.

12. A reviewing court gives considerable deference to the construction of an ordinance by those officials charged with its enforcement. *General Motors v. City of Seattle*, 107 Wn. App. 42, 57, 25 P.3d 1022 (2001).

13. Ford is engaged within the City of Tacoma in the business of making sales at wholesale. Tacoma correctly classified Ford's business activity in Tacoma under the wholesaling classification. The eight elements of Ford's Order Flow Process are constructed around Ford's business activities of making sales at wholesale of vehicles and parts that it manufactures. This is particularly evident in the Wholesale (step three) and Logistics (step eight) elements of the Order Flow Process, as

well as Ford's customer service activities conducted in Tacoma, all of which are engaged in for the express purpose of maximizing wholesale sales of vehicles and parts to Tacoma dealers. Wholesaling is a separate activity from, for example, manufacturing.

14. Ford argues that Tacoma's B & O tax should be apportioned to the business activities engaged in by Ford in Tacoma and not the full value of Ford's gross proceeds of wholesale sales to Tacoma dealers. This argument, however, cannot be reconciled with the language of the U.S. Supreme Court in *Tyler Pipe Indus., Inc.* v. *Washington Dep't of Revenue*, 483 U.S. 232, 251, 107 S. Ct. 2810, 97 L. Ed.2d 199 (1987) and the Washington State Supreme Court in *W.R. Grace & Co. v. State, Dept of Revenue*, 137 Wn.2d 580, 595, 973 P.2d 1011, 1018, *cert. denied*, 120 S. Ct. 371, 145 L. Ed.2d 290 (1999). The cases relied on by Ford, particularly *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995) and *Central Greyhound Lines* v. *Mealy*, 334 U. S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948) are inapplicable.

15. Ford's argument that the activity of "making sales at wholesale" is limited to the acts of transferring ownership or title within the city is contrary to the plain language of Tacoma Tax Rule 103, Time and Place of Sale. Where title to goods passes is irrelevant in determining the proper classification of Ford's business activities conducted within Tacoma.

16. Since Ford's activity of making sales at wholesale is an activity conducted wholly within

Tacoma that no other city has jurisdiction to tax, it is taxable by Tacoma measured by the full value of wholesale sales to local customers under the U.S. Supreme Court holding in *Tyler Pipe*, *supra*. In *Tyler Pipe*, the U.S. Supreme Court held that a B & O tax on interstate sales by out-of-state manufacturers measured by 100 percent of gross proceeds of sales was "apportioned exactly to the activities taxed," . . . "even though the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State that plainly has jurisdiction to tax that activity." *Tyler Pipe*, 483 U.S. at 251, 107 S. Ct. at 2822. In *W.R. Grace*, *supra*, the Washington Supreme Court relied on *Tyler Pipe* in acknowledging that the apportionment issue is well settled. *W.R. Grace*, 137 Wn.2d at 595.

17. *Tyler Pipe* makes clear that the unapportioned assessment of a taxing jurisdiction's B & O tax under the wholesaling classification against the full value of the taxpayer's sales to in-city customers is properly viewed as a tax on a separate activity conducted wholly within the taxing jurisdiction that no other taxing jurisdiction has authority to tax. There is no current Constitutional requirement that Tacoma's B & O tax on the activity of wholesaling tangible goods to customers located in Tacoma be apportioned.

18. Since Tacoma's B & O tax is measured only by the gross proceeds from the sale of vehicles and parts to dealers located in Tacoma, Tacoma is limiting its taxing powers to activities conducted in Tacoma and, further, there is no possibility that Ford could be subjected to a wholesale tax in another

jurisdiction for the same vehicles and parts that are sold to Tacoma dealers.

19. The deductions provided by former TMC 6.68.235, in effect. at the start of the audit, and former TMC 6.68.075(1)(a), in effect at the time of assessment, also prevented the risk of possible multiple taxation.

20. The U.S. Supreme Court has read the Commerce Clause of the U.S. Constitution to prohibit discrimination against interstate commerce, and to bar regulations that unduly burden interstate commerce. Under the test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed 2d 326 (1977) a tax is sustainable so long as the "tax (1) is applied to an activity with a substantial nexus with the taxing [authority], (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the [taxing jurisdiction]." 430 U.S. at 279. Tacoma's B & O tax satisfies all four prongs of the *Complete Auto* test.

21. Tacoma's B & O tax, as applied, does not violate the equal protection clause of the United States Constitution.

22. Tacoma's B & O tax, as applied, does not violate the due process clause of the United States Constitution.

23. Any Conclusion of Law set forth hereinabove that may be deemed to be a Finding of Fact is hereby adopted as such.

From the foregoing Conclusions of Law, the Court does make and enter the following:

DECISION

Ford Motor Company did not meet its burden of proof with respect to Counts 1-3 and 8-12 of its First Amended Complaint. Applying provisions of Title 6 of Tacoma's Municipal Code, and established Washington State and U.S. Supreme Court case law to the stipulated facts, and the documentary and testimonial evidence, the preponderance of the evidence is that Tacoma's assessments issued on or about April 21, 2004 were timely and correct, based on the information and documents known to and made available to Tacoma's auditor. The weight of the evidence further shows that Ford's business activity in Tacoma was and is properly classified as wholesaling. Finally, the evidence and controlling legal precedent make clear that Tacoma's B & O tax is inherently apportioned and is otherwise proper under the Commerce Clause.

For the foregoing reasons, Ford's prayer for relief in Counts 1-3 and 8-12 of its First Amended Complaint is denied.

DATED this 29th day of July, 2005.

_____

HONORABLE KATHRYN J. NELSON

Presented by:

ELIZABETH A. PAULI, Acting City Attorney

By: _____
KARL L. SAND
WSB #27355
Assistant City Attorney
Attorney for Defendant City of Tacoma

Approved as to form:

PERKINS COIE, LLP

By: _____
SCOTT M. EDWARDS
WSB #26455
Attorney for Plaintiff Ford Motor Company

APPENDIX E

Seattle Municipal Code

Section 5.45.050 Imposition of the tax – Tax or fee levied.

There is hereby levied upon and shall be collected from every person as hereinafter provided, for the act or privilege of engaging in business activities within the City, whether his or her office or place of business be within or without the City, a business and occupation tax or fee, sometimes herein referred to as the "tax." The tax shall be in amounts to be determined by application of rates against gross proceeds of sale, gross income of business, or value of products, including by-products, as the case may be, as follows:

* * *

C. Upon every person engaging within the City in the business of making sales at wholesale or retail (including public road construction), except persons taxable under subsection D of this section; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of such sales of the business without regard to the place of delivery of articles, commodities or merchandise sold, multiplied by the rate of two hundred fifteen one-thousandths of one percent (.00215).

* * *

Tacoma Municipal Code

Section 6.68.220 Persons subject to tax – Amount.

There is hereby levied upon and there shall be collected from every person as hereinafter provided for the act or privilege of engaging in business activities within the City of Tacoma ("City"), whether his/her office or place of business be within and/or without the City, a license fee or occupation tax, sometimes herein referred to as the "tax," in amounts to be determined by application of rates given against value of products, including by-products, gross proceeds of sales or gross income of business, as the case may be, for the three calendar months next preceding the beginning of each quarterly period. The tax classifications and rates applicable thereto are as follows:

* * *

B. Upon every person, except persons taxable under subsection E of this section, engaging within this City in the business of making sales at wholesale; as to such persons the amount of the tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one hundred two one-thousandths of one percent (.00102).

* * *

APPENDIX F

THE HONORABLE RICHARD A. JONES

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

FORD MOTOR COMPANY,	
Plaintiff,	NO. 03-2-38146-2 SEA
v.	SECOND AMENDED COMPLAINT FOR REFUND OF TAXES PAID
CITY OF SEATTLE, EXECUTIVE SERVICES DEPARTMENT,	
Defendant.	

FACTS COMMON TO ALL COUNTS

1. Plaintiff Ford Motor Company ("Ford") is a corporation organized, existing and in good standing under the laws of the State of Delaware, and is registered to do business pursuant to the laws of the State of Washington.

2. Defendant, City of Seattle, Washington (the "City"), is a city organized and existing under the laws of the State of Washington.

3. During the years applicable to this suit, vehicle dealers located throughout the United States (including several located in the City) purchased vehicles (and related parts) from Ford at Ford's assembly plants (and parts depots) located outside the State of Washington.

4. The Seattle Municipal Code ("SMC") 5.44.400 (for periods before 2002) and SMC 5.45.050 (for periods after 2001) levy an excise tax for the privilege of engaging in business activities within the City ("B & O tax"), and provide that the amount of tax is determined by multiplying the taxpayer's gross receipts by the applicable tax rate. These sections of the code provide that "making sales at wholesale" within the City is a taxable business activity.

5. Under the SMC, the measure of tax for persons engaged in the business of making sales at wholesale within the City is "the gross proceeds of such sales."

6. At various times, including in prior unrelated litigation, the City has asserted that its B & O tax on the privilege of making sales at wholesale is a tax on a single "inherently local" activity that occurs in only one location and therefore is capable of being subjected to tax in only one location.

7. SMC 5.30.050 defines a "sale" as the "transfer of the ownership of, title to, or possession of, property for a valuable consideration."

8. Ford transfers ownership, title and possession of all vehicles it sells to dealers at Ford's vehicle assembly plants. Ford transfers ownership, title and possession of the parts it sells to dealers at Ford's parts depots.

9. There are no Ford vehicle assembly plants or parts depots located within the City. All of Ford's vehicle assembly plants and parts depots are located outside the City.

10. All sales of Ford vehicles (and related parts) are made by the company at its assembly plants and parts depots, none of which are located in the City.

11. For the period January 1998 through June 2003, Ford paid the City B & O taxes with its filed tax returns in the amount of $970,663.68.

12. On or about September 19, 2003, Ford was assessed an additional $401,968.00 arising from a B & O tax audit, comprised of $265,083.07 in B & O tax, $131,957.73 in interest and $4,927.20 in penalties, all claimed by the City for the period January 1998 through December 2002.

13. On October 15, 2003, Ford paid the assessed tax, interest, and penalty, in the amount of $401,968.00 to the City.

14. On or about November 18, 2003, Ford filed a request for refund of B & O taxes paid with its tax returns with the Director of Revenue and Consumer

Affairs in accordance with SMC 5.55.100 and 5.55.140.

15. On or about December 1, 2003, Ford's request for refund of B & O taxes paid with its tax returns was denied.

16. Ford brings this Complaint challenging the validity and application of City B & O tax paid with Ford's returns and by assessment, pursuant to Washington Constitution, Article IV, Section 6 and RCW 2.08.010, which vest the Superior Court with original jurisdiction over all cases involving "the legality of any tax, impost, assessment, toll or municipal fine." Ford also seeks declaratory relief with respect to subsequent tax periods pursuant to Uniform Declaratory Judgments Act, RCW 7.24.010.

COUNT I - PLACE OF SALE

COMES NOW Ford and for Count I of its Complaint against defendant City states as follows:

17. Plaintiff incorporates by reference paragraphs 1 through 16 of the Complaint as if fully set forth herein.

18. Ford does not engage in the business of "making sales at wholesale" in the City since all sales are made at Ford's assembly plants and parts depots (all of which are outside the City) where ownership, title and possession pass.

19. Ford is entitled to a refund of all taxes, interest and penalties paid to the City both via the assessment and with its returns.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT II - PLACE OF DELIVERY

COMES NOW Ford and for Count II of its Complaint against defendant City states as follows:

20. Plaintiff incorporates by reference paragraphs 1 through 19 of the Complaint as if fully set forth herein.

21. By ordinance, the City is prohibited from imposing its B & O tax based on delivery of Ford's vehicles to dealers located in the City, as SMC 5.45.050(C) provides that the City's tax is imposed "without regard to the place of delivery of articles, commodities, or merchandise sold."

22. Contrary to SMC 5.45.050(C), the City assessed B & O tax against Ford based on Ford's gross receipts from sales of vehicles and parts shipped and delivered to dealers located in the City.

23. Ford is entitled to a refund of all B & O taxes, interest and penalties paid to the City both via the assessment and with its tax returns.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT III - NO GROSS RECEIPTS FROM SEATTLE ACTIVITIES

COMES NOW Ford and for Count III of its Complaint against defendant City states as follows:

24. Plaintiff incorporates by reference paragraphs 1 through 23 of the Complaint as if fully set forth herein.

25. Although Ford does not make "sales at wholesale" within the City as determined by the "inherently local" act of transferring ownership, title or possession to the goods that Ford sells (because Ford conducts those activities at the vehicle assembly plant or parts depots), Ford does engage in some limited activities within the City. Specifically Ford representatives periodically travel into the City

to visit dealerships within the City as set forth in more detail below.

26. Ford representatives make in-person visits to two dealerships located within the City approximately twice per month per dealership. During those periodic visits, Ford representatives ensure that dealers are aware of recent informational bulletins distributed to the dealer electronically, discuss available vehicle allocations, consult regarding dealership performance and occasionally provide training to dealer employees.

27. Ford did not maintain any office or place of business or employ any persons within the City for any of the relevant tax periods in question.

28. SMC 5.45.080(B) provides that a person "engaging in business activities in the City who does not maintain a place of business in the City shall allocate to the City that portion of the taxpayer's gross income or gross proceeds of sales that are derived from business activities performed in the City."

29. Ford does not bill dealerships for, and therefore does not derive gross proceeds from the activities conducted by Ford representatives on the dealerships' premises, which activities are merely customer support activities.

30. Ford is entitled to a refund of all taxes, interest and penalties paid to the City both via the assessment and with its B & O tax returns.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT IV - VOLUME OF SALES TO SEATTLE DEALERS

COMES NOW Ford and for Count IV of its Complaint against defendant City states as follows:

31. Plaintiff incorporates by reference paragraphs 1 through 30 of the Complaint as if fully set forth herein.

32. During its audit of Ford, the City attempted to determine the total gross receipts received by Ford from sales of vehicles and parts to dealerships located in the City.

33. Revenue data provided by Ford to the City included gross receipts from sales to some dealerships whose postal address indicates Seattle, but the dealership is actually outside the City limits.

34. The revenue data provided by Ford also included gross receipts from vehicles manufactured

outside the United States, which sales are not subject to state and local tax pursuant to the Import/Export Clause of the United States Constitution.

35. In the event that the SMC was construed to impose B & O tax on Ford's gross receipts from sales of vehicles to dealers located within the City, the total gross receipts from vehicle and parts sales during the period January 1998 through June 2003 is $337,892,677.

36. The amount of the City wholesaling B & O tax due on the gross receipts identified in the previous paragraph would be $726,469. Ford is entitled to a refund of $646,162 for B & O tax, interest and penalties paid on gross receipts from vehicles and parts sold to dealers outside the City and vehicles manufactured outside the United States and sold before completion of the import journey during the period January 1998 through June 2003.

WHEREFORE, Ford prays this Court enters judgment in Ford's favor and against the City (A) ordering the City to refund to Ford the amount of $646,162 for B & O tax, interest and penalties paid on gross receipts from vehicles and parts sold to dealers outside the City and vehicles manufactured outside the United States and sold before completion of the import journey; (B) interest on all refund amounts from the date of original payment through the date of refund; (C) for an award of its costs and expenses herein, including reasonable attorneys fees; and (D) such other and further relief as the Court deems just and proper.

COUNT V - MULTIPLE ACTIVITIES TAX CREDIT

COMES NOW Ford and for Count V of its Complaint against defendant City states as follows:

37. Plaintiff incorporates by reference paragraphs 1 through 36 of the Complaint as if fully set forth herein.

38. SMC 5.45.070 provides a credit for eligible gross receipts taxes paid to another jurisdiction with respect to the manufacture of products on which the City subsequently imposes its wholesaling B & O tax.

39. During the period January 1998 through December 2002, Ford paid eligible gross receipts taxes in the amount of $19,989 to the city of Hazelwood, Missouri with respect to vehicles produced at Ford's assembly plant there and sold to dealerships located in the City.

40. Ford is entitled to a credit against the City's tax liability in the amount of $19,989 for the eligible gross receipts taxes it paid to Hazelwood, Missouri.

WHEREFORE, Ford prays this Court enters judgment in Ford's favor and against the City (A) ordering the City to refund to Ford the amount of $19,989 for multiple activities tax credits; (B) interest on all refund amounts from the date of original payment through the date of refund; (C) for an award of its costs and expenses herein, including reasonable attorneys fees; and (D) such other and further relief as the Court deems just and proper.

COUNT VI - TAX IN PROPORTION TO SEATTLE ACTIVITIES

COMES NOW Ford and for Count VI of its Complaint against defendant City states as follows:

41. Plaintiff incorporates by reference paragraphs 1 through 40 of the Complaint as if fully set forth herein.

42. At various times, the City has asserted that its B & O tax on the privilege of "making sales at wholesale" is not imposed on a single "inherently local" activity but, rather, is imposed on any business activity conducted within the City related to selling goods at wholesale. Consequently, SMC 5.30.030 and former Seattle Business Tax Rule 5-44-002 identify a number of selling related activities that the City asserts trigger imposition of the City's B & O tax when conducted within the City, including but not limited to: maintaining an office or place of business, maintaining an inventory or stock of goods, solicitation, negotiation, acceptance of orders, credit investigation, credit approval, providing technical assistance with respect to products sold by the person providing assistance, collecting current or delinquent accounts, receiving the purchase price, meeting with customers or prospective customers even when no sales or orders are solicited during the meeting, and passage of title.

43. Many of the selling related activities expressly identified by the City in SMC 5.30.030 and former SBTR 5-44-002 are conducted by Ford exclusively outside the City. Nevertheless, the City has imposed B & O tax on those activities.

44. The limited customer service activities Ford conducts within the City are dwarfed by the substantial activities conducted by Ford outside the City relating to sales to in City dealerships; those outside activities include activities conducted at Ford's regional office in Bellevue (where most dealer communications are handled), at Ford headquarters in Dearborn Michigan (where vehicle allocations are made, incentive programs developed, orders are received and accepted and credit investigation conducted, credit decisions made and the purchase price is received) and Ford's various vehicle assembly plants and parts depots (where inventory is maintained and ownership, title and possession are transferred).

45. In the event that the SMC is construed to impose tax on Ford as a result of Ford's limited customer service activities within the City (notwithstanding the fact that Ford's sales are made outside the City and it derives no gross receipts from its in city customer support activities), SMC 5.45.080(B) limits the City's tax to that portion of Ford's gross receipts attributable to Ford's activities conducted within the City.

46. A fair allocation or apportionment of Ford's gross receipts from sales of vehicles and parts to the City dealers attributable to Ford's activities conducted within the City is eight one hundredths of one percent (0.08%) of the gross proceeds of sales to the City dealers.

47. Tax on 0.08% of Ford's sales to the City dealers during the period January 1998 through June 2003 would be $58,118.

WHEREFORE, Ford prays this Court enters judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford of B & O taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $912,546; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT VII - COMMERCE CLAUSE

COMES NOW Ford and for Count VII of its Complaint against defendant City states as follows:

48. Plaintiff incorporates by reference paragraphs 1 through 47 of the Complaint as if fully set forth herein.

49. Article I, Section 8, Clause 3 (the "Commerce Clause") of the United States Constitution provides that "Congress shall have Power... To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The Commerce Clause protects free trade among the states by restricting the taxing powers of both state and municipal governments.

50. The City may constitutionally tax only that portion of a business's selling activities occurring within the City.

51. The City's B & O tax is not limited to Ford's activities occurring solely within the City, but also imposes the B & O tax on revenue derived from Ford's activities and operations outside the City.

52. The City's B & O Tax unduly burdens interstate commerce by failing to fairly apportion the City's tax to Ford's activities conducted within the City.

53. The B & O Tax reaches beyond that portion of the value that is fairly attributable to Ford's economic activity within the City.

54. The B & O Tax discriminates against commercial activity occurring outside of the City and Washington and, therefore, interstate commerce, which violates the Commerce Clause on its face.

55. The B & O Tax is not reasonably or "fairly related to the services provided" by the City to Ford, as required by the Commerce Clause.

56. The City may constitutionally tax only that portion of Ford's activities that occur within the City, and therefore, any attempt by the City to impose the tax on any part of Ford's gross receipts beyond those corresponding to Ford's operations that take place within the City discriminates against interstate commerce and is unconstitutional as applied to Ford.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O Taxes, interest and penalties paid on October 15,

2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O Taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT VIII - EQUAL PROTECTION

COMES NOW Ford and for Count VIII of its Complaint against defendant City states as follows:

57. Plaintiff incorporates by reference paragraphs 1 through 56 of the Complaint as if fully set forth herein.

58. Article I, Section 12 of the Washington Constitution mandates "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

59. The Fourteenth Amendment, Section 1, to the United States Constitution prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."

60. The B & O Tax is violative of the equal protection clause of Article I, Section 12 of the Washington Constitution and the equal protection clause of the Fourteenth Amendment, Section 1, to the United States Constitution, in that the B & O

Tax results in an undue tax burden on businesses with multiple operations located outside the City compared to the tax burden on businesses with operations solely within the City.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O Taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O Taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT IX - DUE PROCESS

COMES NOW Ford and for Count IX of its Complaint against defendant City states as follows:

61. Plaintiff incorporates by reference paragraphs 1 through 60 of the Complaint as if fully set forth herein.

62. Article I, Section 3 of the Washington Constitution provides that "no person shall be deprived of ... property, without due process of law."

63. The Fourteenth Amendment, Section 1, to the United States Constitution provides that a state may not "deprive any persons of ... property without due process of law."

64. The B & O Tax is not reasonably related to Ford's activities within the City, as required by the Due Process Clause of the United States Constitution or the Due Process Clause of the Washington Constitution.

65. The SMC, on its face and as applied, creates an unreasonable, arbitrary and discriminatory classification without reasonable justification and, therefore, deprives Ford of its property without due process in violation of the Washington and United States constitutions.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O Taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O Taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT X - DECLARATORY JUDGMENT

COMES NOW Ford and for Count X of its Complaint against defendant City states as follows:

66. Plaintiff incorporates by reference paragraphs 1 through 65 of the Complaint as if fully set forth herein.

67. A present, justiciable controversy exists as to whether the B & O tax is capable of enforcement on its face or as applied by the City against Ford under the above-cited City ordinances, Washington statutes or United States Constitution at present and in the future.

WHEREFORE, Ford prays this Court enter a declaratory judgment in Ford's favor and against the City finding that

(A) Ford does not engage within the City in the business of making sales at wholesale;

(B) Although Ford engages in business activities in the City, it does not maintain a place of business in the City, has no gross income and derives no gross proceeds of sales from business activities within the City, and therefore is not required to allocate to the City any portion of its gross income or gross proceeds of sales under SMC 5.45.080(B);

(C) In the alternative to (B), Ford is entitled to apportion the City's tax based on the proportion of its limited customer service activities conducted within the City to activities conducted outside the City; and

Such other and further relief as the Court deems just and proper.

DATED: December 16, 2004.

PERKINS COIE LLP

By: _____

Scott Edwards; WSBA #26455
Attorneys for Plaintiff
Ford Motor Company

APPENDIX G

The Honorable Frederick W. Fleming

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

FORD MOTOR COMPANY, Plaintiff, v. CITY OF TACOMA Defendant.	NO. 04-2-08497-6 FIRST AMENDED COMPLAINT FOR REFUND OF TAXES PAID

COMES NOW Plaintiff, Ford Motor Company ("Ford"), and for its complaint against Defendant, City of Tacoma ("Tacoma" or "City"), states as follows:

NATURE OF ACTION

This is a declaratory judgment and refund action challenging the legality of Tacoma's assessment of municipal business and occupation tax against Ford Motor Company. The City's effort to assess tax on Ford's sales to dealers located within the City is both contrary to the Tacoma Municipal Code and unconstitutional.

JURISDICTION

1. This Court has jurisdiction pursuant to the Uniform Declaratory Judgments Act, RCW 7.24.010, and pursuant to the Washington Constitution, Article IV, Section 6 and RCW 2.08.010, which vest the Superior Court with original jurisdiction over all cases involving "the legality of any tax, impost, assessment, toll or municipal fine."

PARTIES

2. Plaintiff Ford is a corporation organized, existing and in good standing under the laws of the State of Delaware, and is registered to do business pursuant to the laws of the State of Washington.

3. Defendant, Tacoma, is a city organized and existing under the laws of the State of Washington.

FACTS

4. During the years applicable to this suit, automobile dealers located throughout the United States (including several located in the City) purchased vehicles (and related parts) from Ford at Ford's assembly plants (and parts depots) located outside the State of Washington.

5. The Tacoma Municipal Code ("TMC") imposes an excise tax ("B & O tax") on "the act or

privilege of engaging in business activities within the City," and provides that the amount of tax is determined by multiplying the taxpayer's gross receipts by the applicable tax rate. The TMC provides that "making sales at wholesale" within Tacoma is a taxable business activity.

6. Under the TMC, the measure of tax for persons engaged in the business of making sales at wholesale within Tacoma is the "gross proceeds of sales." Regardless of where related activities may occur, all sales of Ford vehicles are made by the company at its assembly plants, none of which are located in Tacoma (or even within Washington).

7. TMC 6.68.050 defines a "sale" as the "transfer of the ownership of, title to, or possession of, property for a valuable consideration."

8. Ford transfers ownership, title and possession of all vehicles it sells to dealers at Ford's vehicle assembly plants. Ford transfers ownership, title and possession of the parts it sells to dealers at Ford's parts depots.

9. There are no Ford vehicle assembly plants or parts depots located within the City. All of Ford's vehicle assembly plants and parts depots are located outside the city (and outside Washington).

10. All sales of Ford vehicles (and related parts) are made by the company at is assembly plants and parts depots, none of which are located in the City.

11. For the period January 2000 through June 2004 Ford paid Tacoma B & O tax with its regularly filed returns in the total amount of $202,725.17.

12. On or about April 21, 2004, Tacoma's Tax and License Division mailed to Ford two unsigned documents labeled "Field Auditor's Reports." They reflected additional tax, interest and penalties for periods from January 1, 1990 through December 31, 2002 totaling $1,307,933.83. Those unexecuted Field Auditor's Reports were not accompanied by any Notice of Assessment.

13. Tacoma has orally advised Ford that the Field Auditor's Reports should be considered formal tax assessments.

14. Tacoma has adopted an ordinance that says the exclusive procedure for contesting the validity of a Tacoma tax assessment is to pay the assessment and file an appeal with the City Clerk (to obtain an administrative hearing before the City of Tacoma Hearing Examiner).

15. TMC 6.01.140 and 6.01.150 invalidly purport to limit a taxpayer's rights under Washington Constitution, Article IV, Section 6 and RCW 2.08.010 to invoke the Superior Court's original jurisdiction to hear cases involving the legality of a tax or assessment.

16. A municipality, like Tacoma, has no authority to prescribe or restrict jurisdiction, practice and procedure in Superior Court. *Mary*

Kay, Inc. v. Tacoma, Wn. App. 111, 117, 70 P3d 146 (2003) (dismissing tax case filed pursuant to Tacoma Municipal Code); *City of Spokane v. J-R Distrib., Inc.*, 90 Wn.2d 722, 726-27, 585 P.2d 784 (1978) (municipality cannot prescribe to the superior court the practices and procedures the municipality expects the superior court to follow).

17. Out of an abundance of caution, on May 12, 2004, in accordance with the procedures asserted by Tacoma in TMC 6.01.140 and 6.01.150, Ford paid the disputed assessments in full ($1,307,933.83) and filed a Notice of Appeal with the Tacoma City Clerk.

18. By stipulation of the parties the administrative appeal has been stayed pending the resolution of this case.

COUNT I

19. Ford incorporates by reference paragraphs 1 through 18 of the Complaint as if fully set forth herein.

20. Ford does not engage in the business of "making sales at wholesale" in the City since all sales are made at Ford's assembly plants and parts depots (all of which are outside the City) where ownership, title, and possession pass.

21. Ford is entitled to a refund of all taxes, interest and penalties paid to the City both via the assessment and with its returns.

COUNT II

22. Ford incorporates by reference paragraphs 1 through 21 of the Complaint as if fully set forth herein.

23. By ordinance, the City is prohibited from imposing its B & O tax based on delivery of Ford's vehicles to dealers located in the City, as TMC 6.68.050(1)(c) provides that the City's tax is imposed "without regard to the place of delivery of articles, commodities, or merchandise sold."

24. Contrary to TMC 6.68.050(1)(c), the City assessed tax against Ford based on Ford's gross receipts from sales of vehicles and parts shipped and delivered to dealers located in the City.

25. Ford is entitled to a refund of all taxes, interest and penalties paid to the City both via the assessment and with its returns.

COUNT III

26. Ford incorporates by reference paragraphs 1 through 25 of the Complaint as if fully set forth herein.

27. Although Ford does not make "sales at wholesale" within the City as determined by the inherently local act of transferring ownership, title or possession to the goods Ford sells (because Ford conducts those activities at the vehicle assembly plant or parts depots), Ford does engage in some limited activities within the City. Specifically Ford

representatives periodically travel into the City to visit dealerships within the City as set forth in more detail below.

28. Ford representatives' in-person visits to local dealerships are conducted approximately twice per month per dealership. During those periodic visits, Ford representative ensure that dealers are aware of recent informational bulletins distributed to the dealer electronically, discuss available vehicle allocations, consult regarding dealership performance and occasionally provide training to dealer employees.

29. Ford did not maintain any office or place of business or employ any persons within the City for any of the relevant tax periods in question.

30. Tacoma's B & O tax only applies to gross income or gross proceeds of sales that are derived from business activities performed in the City.

31. Ford does not bill dealers for, and therefore does not derive gross income or gross proceeds from, the activities conducted by Ford representatives on the dealers' premises, which activities are merely customer support activities.

32. Ford is entitled to a refund of all taxes, interest and penalties paid to the City both via the assessment and with its returns.

COUNT IV

33. Ford incorporates by reference paragraphs 1 through 32 of the Complaint as if fully set forth herein.

34. During its audit of Ford, the City attempted to determine the total gross receipts received by Ford from sales of vehicles and parts to dealers located in the City.

35. The Assessments used estimated figures for Ford vehicle unit sales to dealerships located in Tacoma for the years 2000, 2001 and 2002. Those estimated figures overstate the actual unit sales to dealerships located in Tacoma for the period 2000 through 2002.

36. Even in the event that the TMC was construed to impose tax on Ford's gross receipts from sales of vehicles and parts to dealerships located within the City, Ford is entitled to a refund of tax, interest and penalties assessed and paid on amounts in excess of actual gross receipts from vehicles sold to dealerships located in Tacoma for the period 2000 through 2002.

COUNT V

37. Ford incorporates by reference paragraphs 1 though 36 of the Complaint as if fully set forth herein.

38. TMC 6.68.070 provides a credit for eligible gross receipts taxes with respect to the

manufacture of products on which the City subsequently imposes its wholesaling B & O tax.

39. Ford paid eligible gross receipts taxes to the city of Hazelwood, Missouri with respect to vehicles produced at Ford's assembly plant there and sold to dealer located in the City.

40. Ford is entitled to a credit against any City tax liability for the eligible gross receipts taxes it paid to Hazelwood, Missouri.

COUNT VI

41. Ford incorporates by reference paragraphs 1 through 40 of the Complaint as if fully set forth herein.

42. The TMC limits the "gross income of the business" to the value proceeding or accruing from the business activities engaged in, including compensation for rendition of services.

43. The assessments include in the measure of service B & O tax, amounts identified in the Field Auditor's reports as "advertisement."

44. These amounts are not compensation for services rendered or any other form of gross income. Ford does not provide any advertising services to dealers. The "advertisement" amounts reflect sums pooled by dealerships to purchase local and regional advertising.

45. Tacoma's assessments are erroneous and Ford is entitled to a refund of all amounts (tax, interest and penalties) assessed on "advertisement" monies.

COUNT VII

46. Ford incorporates by reference paragraphs 1 through 45 of the Complaint as if fully set forth herein.

47. The assessment also impose service B & O tax against Ford for revenue from extended warranties.

48. Ford does not provide extended warranties; extended warranties are provided by a different company.

49. Tacoma's assessment are erroneous and Ford is entitled to a refund of all amounts (tax, interest and penalties) assessed on extended warranty revenue.

COUNT VIII

50. Ford incorporates by reference paragraphs 1 through 49 of the Complaint as if fully set forth herein.

51. Ford is registered with the City of Tacoma.

52. The TMC prohibits the City from assessing municipal B & O tax against registered

taxpayers for periods more than four years prior to the current year. Thus, the limitations period has run for Tacoma to assess tax against Ford for the periods 1994 through 1999, even if tax were otherwise properly due.

53. Tacoma's assessments are erroneous and Ford is entitled to a refund of all amounts assessed (tax, interest and penalties) for the period 1994 through 1999 as barred by the applicable limitations period.

COUNT IX

54. Ford incorporates by reference paragraphs 1 through 53 of the Complaint as if fully set forth herein.

55. Upon information and belief, the City asserts that its B & O tax on the privilege of "making sales at wholesale" is not imposed on a single inherently local activity but, rather, is imposed on any business activity conducted within the City related to selling related goods at wholesale. Consequently, TMC 6.68.030 identifies a number of selling related activities that the City asserts trigger imposition of the City's B & O tax when conducted within the City, including but not limited to: maintaining an office of place of business, maintaining an inventory or stock of goods, solicitation, negotiation, acceptance of orders, credit investigation, credit approval, providing technical assistance with respect to products sold by the person providing assistance, collecting current or delinquent accounts, receiving the purchase price,

meeting with customers or prospective customers even when no sales or orders are solicited during the meeting, and passage of title.

56. Many of the selling related activities expressly identified by the City in TMC 6.68.030 are conducted by Ford exclusively outside the City. Nevertheless the City has imposed B & O tax on those activities.

57. The limited customer service activities Ford conducts within the City are dwarfed by the substantial activities conducted by Ford outside the City relating to sales to in City dealerships; those outside activities include activities conducted at Ford's regional office in Bellevue (where most dealer communications are handled), at Ford headquarters in Dearborn Michigan (where vehicle allocations are made, incentive programs developed, orders are received and accepted and credit investigation conducted, credit decisions made and the purchase price is received) and Ford's various vehicle assembly plants and parts depots (where inventory is maintained and ownership, title and possession are transferred).

58. In the event that the TMC is construed to impose tax on Ford as a result of Ford's limited customer service activities within the City (notwithstanding the fact that Ford's sales are made outside the City and it derives no gross receipts from its in city customer support activities), the City's tax is limited to that portion of Ford's gross receipts attributable to Ford's activities conducted within the City.

59. A fair allocation or apportionment of Ford's gross receipts from sales of vehicles and parts to the City dealers attributable to Ford's activities conducted within the City is 0.08% of the gross proceeds of sales to the City dealers. Ford is entitled to a refund for tax, interest and penalties paid on gross receipts from vehicles and parts sold in excess of receipts fairly apportioned to the City.

COUNT X

60. Ford incorporates by reference paragraphs 1 through 59 of the Complaint as if fully set forth herein.

61. Article I, Section 8, Clause 3 (the "Commerce Clause") of the United States Constitution provides that "Congress shall have Power ... To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The Commerce Clause protects free trade among the states by restricting the taxing powers of state and local governments.

62. The City may constitutionally tax only that portion of a business's selling activities occurring within the City.

63. As written, the City's tax code seeks to tax the entire "gross proceeds of sales" including the "value proceeding or accruing" from the sale of tangible personal property, i.e. the amount of the sale at wholesale for each and every one of the vehicles manufactured, assembled and sold at Ford

locations throughout the country and world-wide, if the purchaser's (dealer's) business was located in Tacoma.

64. Tacoma's assessments impose tax on gross proceeds derived from Ford's activities and operations outside the City.

65. The assessments reach beyond that portion of the value that is fairly attributable to Ford's economic activity within Tacoma.

66. The City's B & O tax unduly burdens interstate commerce by failing to fairly apportion the City's tax.

67. Tacoma's assessments result in successive taxation of Ford's interstate activities and the gross receipts derived therefrom.

68. The City's B & O tax discriminates against interstate commerce.

69. The City's B & O tax is not reasonably or "fairly related to the services provided" by the City to Ford.

70. The City may constitutionally tax only that portion of Ford's activities that occur within the City, and therefore, any attempt by Tacoma to impose the tax on any part of Ford's gross receipts beyond those corresponding to Ford's activities that take place within the City, is not fairly apportioned, discriminates against interstate commerce and is unconstitutional as applied to Ford.

COUNT XI

71. Ford incorporates by reference paragraphs 1 through 70 of the Complaint as if fully set forth herein.

72. Article I, Section 12 of the Washington Constitution mandates "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

73. The Fourteenth Amendment, Section 1, to the United States Constitution prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."

74. The City's B & O tax and the assessments violate the equal protection clause of Article I, Section 12 of the Washington Constitution and the equal protection clause of the Fourteenth Amendment, Section 1, to the United States Constitution, in that they result in an undue tax burden on businesses with multiple operations located outside Tacoma, compared to the tax burden on businesses with operations located solely within Tacoma.

COUNT XII

75. Ford incorporates by reference paragraphs 1 though 74 of the Complaint as if fully set forth herein.

76. Article I, Section 3 of the Washington Constitution provides that "no person shall be deprived of . . . property, without due process of law."

77. The Fourteenth Amendment, Section 1, to the United States Constitution provides that a state may not "deprive any persons of . . . property without due process of law."

78. The City's B & O tax and the assessments are not reasonably related to Ford's activities within the City of Tacoma, as required by the Due Process Clause of the United States Constitution or the Due Process Clause of the Washington Constitution.

79. The TMC, on its face and as applied, creates an unreasonable, arbitrary and discriminatory classification without reasonable justification and, therefore, deprives Ford of its property without due process in violation of the Washington and United States constitutions.

PRAYER FOR RELIEF

WHEREFORE, Ford prays that this Court:

1. Enter a declaratory judgment for Ford and against Tacoma finding that:

(a) Ford does not engage within the City in the business of making sales at wholesale, and

(b) Ford is not required to allocate any portion of its gross proceeds of sales or gross income of the business to the City; or

(c) In the alternative to (b), Ford is entitled to apportion City tax based on the proportion of its limited customer service activities conducted within the City to the selling activities it conducts outside the City.

2. Enter a judgment in favor of Ford and against Tacoma for refund of all tax, interest and penalties paid by Ford pursuant to the assessments together with taxes overpaid with Ford's returns in the total amount of $1,510,659.00 or such other amount to be proved at trial, plus prejudgment and post judgment interest as provided by law;

3. Award Ford its costs, including reasonable attorneys fees; and

4. Grant such further relief as the Court deems just and proper.

DATED: December 16, 2004.

PERKINS COIE LLP

By: _____
Scott M. Edwards, WSBA #26455
Attorneys for Plaintiff
Ford Motor Company

APPENDIX H

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

FORD MOTOR COMPANY, Plaintiff, v. CITY OF TACOMA, Defendant.	NO. 04-2-08497-6 STIPULATION OF FACTS

STIPULATION

It is hereby stipulated by and between the parties for the purpose of this case that the following facts may be considered true and correct for all periods at issue, subject to the right of either party to object to such facts on the grounds of materiality or relevance and subject to the right of either party to introduce further evidence not inconsistent herewith.

Facts

1. Ford Motor Company ("Ford") manufactures vehicles and parts, which it sells at wholesale, to independent Ford and Lincoln-Mercury dealerships.

2. Ford conducts business activities in Tacoma.

3. Ford has nexus with Tacoma for B & O tax purposes.

4. The period at issue in this case is January 1990 through December 2002 (hereinafter "the audit period").

5. During the audit period, there were two Ford dealers in Tacoma, Titus-Will Ford and Mallon Ford. These dealers purchased vehicles and parts at wholesale from Ford during that period.

6. During the years 1990 to 1993, Ford had a partial ownership interest in Mallon Ford.

7. In or about September 2001, the owners of Titus-Will Ford purchased Mallon Ford.

8. During the period January 1990 through June 2000, there was one Lincoln-Mercury dealer in Tacoma, Bill Gill Lincoln-Mercury. Bill Gill Lincoln-Mercury ceased operations as a Lincoln-Mercury dealer in approximately June 2000. This dealer purchased vehicles and parts at wholesale from Ford during that period.

9. In December 1999, Tacoma Senior Auditor Jerry Wheeler wrote to Ford concerning the need to register and about the City's intent to audit Ford.

10. In January 2000, Mr. Wheeler again wrote to Ford about registration and audit.

11. In March 2000, Ford registered with Tacoma and paid annual business license fees and late

penalties for each of the years 1994 through 2000 in the total amount of $720.

12. In December 2000, Tacoma issued a jeopardy assessment to Ford for the years 1990 and 1991.

13. For the period January 2000 through June 2004, Ford paid Tacoma B & O tax with its regularly filed returns in the total amount of $190,800.16.

14. Tacoma assessed B & O tax against Ford for the audit period under the wholesale classification.

15. On or about April 21, 2004, Tacoma's Tax and License Division mailed Ford two unsigned documents labeled "Field Auditor's Reports." The reports reflect additional tax, interest and penalties for the period January 1, 1990 through December 31, 2002 totaling $1,307,933.83.

16. Tacoma verbally advised Ford that the Field Auditor's Reports should be considered tax assessments.

17. Issues with the City's new computer system prevented automated production of a formal Notice of Assessment.

18. On or about May 12, 2004, Ford paid the amount indicated on the Field Auditor's Reports and commenced this lawsuit.

19. Tacoma's calculation of tax for the years 2000 through 2002 was based on estimated figures.

20. Some vehicles purchased by Tacoma dealers were assembled at Ford's Saint Louis Assembly Plant ("SLAP"), which is physically located in Hazelwood, Missouri.

21. Ford paid gross receipts taxes to the City of Hazelwood for its manufacturing activities.

22. Under Tacoma's B & O tax scheme, Ford is entitled to a deduction from the measure of Tacoma B & O tax for gross receipts used in the measure of Ford's Hazelwood gross receipts tax on vehicles manufactured in Hazelwood and ultimately sold at wholesale to dealers located in Tacoma.

23. For purposes of the audit at issue herein, the parties stipulate that the measure of Ford's tax with respect to gross income or gross proceeds of sale from vehicle parts may be calculated as 16.5% of the measure of tax with respect to gross income or gross proceeds of sale from vehicles.

24. The design and development of new and improved vehicles and vehicle features is an important driver of new vehicle sales for Ford.

25. Ford employs more than 300 people in its research, development, testing, engineering and design facilities, all of which are located outside Tacoma.

26. All of Ford's vehicle assembly plants are located outside of Washington.

27. All of Ford's parts depots are located outside of Washington.

28. Ford has a Northwest Region Office located in Bellevue, Washington.

29. Ford employs approximately 30 at its Northwest Region Office.

30. The Northwest Region for Ford is responsible for approximately 145 Ford and Lincoln-Mercury dealerships located in the states of Alaska, Washington, Oregon, Idaho and Montana, as well as the northernmost part of California.

31. Ford's new vehicles are sold at retail exclusively through independent Ford and Lincoln-Mercury dealers. The relationship between Ford and the dealers is governed by the terms of Ford's Sales and Service Agreement.

32. Ford supplements its Sales and Service Agreements with its dealers using Terms of Vehicle Sale Bulletins. Bulletins Nos. 9 and 10 were issued during the audit period.

33. Dealers purchase and receive vehicles through processes established by Ford. Ford refers to these processes as the "Order Flow Process."

34. Ford's Order Flow Process consists of eight processes: Program, Allocation, Wholesale, Scheduling, Segmenting, Sequencing/Blending, Build, and Logistics. These eight processes are conducted partly in Michigan, partly in the

individual manufacturing and assembly plant locations throughout the U.S., partly in the Bellevue, Washington Northwest Region office and partly in Tacoma.

35. Ford's order flow process applies equally to its Ford Division and Lincoln-Mercury Division.

36. The Program element of Ford's Order Flow Process, which is conducted in Michigan, consists of determining rolling, 11-month forecast of U.S. car and truck industry sales. This rolling forecast is used to determine a forecast of vehicle line sales and production requirements as well as commodities (tires, engines types, car stereos, etc.) allocation projections.

37. The outputs of the Program process are used to determine the allocations of vehicles to specific dealers.

38. During the Allocation element of Ford's process, which occurs in Michigan, Ford determines the number of vehicles, by vehicle line, that will be offered to each region office and individual dealers in the upcoming production period, based on the national forecast, the sales history of the region and individual dealers as well as upcoming marketing programs.

39. During Allocation, Ford also reviews plant capacity, makes provisions for reserve requirements (e.g. fleet sales, government sales, etc.) and determines commodity restrictions and their

equitable distribution among individual regions based on sales, stock, and availability data.

40. The final output of the Allocation process consists of Earned Allocation reports, which list the amounts and types of vehicles allocated to each region and dealer throughout the U.S.

41. The Earned Allocation reports are forwarded to Ford's regional offices, including the Northwest Region office in Bellevue.

42. Approximately 150 Ford employees in Dearborn, Michigan, are involved in Program and Allocation processes.

43. Upon receipt of the Earned Allocation report, the Ford Northwest Region office's entire staff conducts a two-day meeting at its Bellevue office. This meeting is considered the first step in the Wholesale element of Ford's Process.

44. At the Region Meeting, region staff reviews the Allocation, discusses current market conditions, near future market conditions, and strategies on how to persuade dealers to commit to the allocation.

45. After the Region Meeting, the District Manager works with the Zone Managers to develop individualized plans for presenting the Allocation to each dealer.

46. Based on the Earned Allocation report and the strategy developed during and after the Region Meeting, the Zone Manager prepares a commitment

form for the dealer to sign at Dealer Commitment meetings.

47. During Dealer Commitment meetings, which occurred approximately 10 times per year per dealer and lasted approximately 1 ½ hours per meeting per dealer during the audit period, a Zone Manager for either Ford or Lincoln-Mercury met with the dealers in Tacoma, presented the commitment form, and the dealer committed to order a specific number of vehicles, by vehicle line, to be manufactured during the next production cycle.

48. Since late 2001, when Titus-Will and Mallon Ford came under common ownership, there is a single commitment meeting for both dealerships, which is conducted at Titus-Will Ford in Tacoma.

49. The dealer may commit to order all or only a portion of the production allocated to it.

50. The dealer may also request a supplemental order for vehicles in excess of its allocation, which is also noted on the commitment form during the Dealer Commitment meeting.

51. Both the dealer and the Zone Manager sign the completed commitment form at the Dealer Commitment meeting.

52. The signed Dealer Commitment is taken back to the Northwest Region Office and the commitment information is forwarded to Ford headquarters in Dearborn, Michigan.

53. After the Dealer Commitment meetings, to the extent that a dealer committed to less than its full allocation, the Zone Manager attempts to identify other dealers willing to order the uncommitted allocation and also attempts to identify uncommitted allocations of other dealers that could be used to satisfy dealer demand for supplemental orders.

54. These post-Dealer Commitment activities occur at the Northwest Region office in Bellevue.

55. In addition to Dealer Commitment meetings, the Zone Manager also visited the dealerships in Tacoma on an approximately monthly basis to provide business consultation and guidance.

56. Once the Dealer Commitment is "accepted," at Ford headquarters dealers may electronically order against the commitment. This occurs as part of the Scheduling element of Ford's Process.

57. The Scheduling element begins in Michigan where, based on the Dealer's Commitment, together with factors such as fast turning units, and dealer sales history, preferences and inventories, Ford creates a "Suggested Retail Order ("SRO")" for each week of the production cycle. The production period varies from 4 to 10 weeks.

59. Ford inputs or uploads the SRO into its ordering and tracking system. Dealers may either accept or modify the SRO.

59. Each SRO addresses numerous variants that are available with each vehicle and include such items as colors, body style, engine size and optional equipment.

60. Dealers interface with the ordering and tracking system via computer to place orders, referred to as a Dealer Generated Order, against their earlier commitment. A dealer may create an order that is unrelated to an SRO. If the dealer takes no action, eventually the SRO is converted to an order.

61. Dealers are able to electronically track against their orders and their Commitment via computer from scheduling, through the manufacturing process, through delivery to the carrier and through the logistics process for the production period covered by the commitment.

62. A Planning and Distribution Manager, located at the region office, reviews all Dealer Generated Orders to confirm that the vehicle specifications called for reflect a "buildable" vehicle.

63. If a dealer orders a vehicle that is not buildable, the Planning and Distribution Manager or the Distribution Analyst will contact the dealer either by telephone or e-mail to advise the dealer of the problem with the order and request that the dealer revise its order.

64. A Distribution Analyst, who reports to the Planning and Distribution Manager, monitors orders

placed by dealers are timely placing orders consistent with their commitments.

65. On the rare occasions when a dealer does not timely place an order per its commitment, the dealership may receive a telephone call or e-mail reminder. These actions are performed either at the regional office in Bellevue or at Ford's headquarters in Dearborn, Michigan.

66. The Scheduling process ends when orders are entered into the computerized ordering and tracking system.

67. During Segmenting, Ford's Michigan personnel assign vehicle orders to an assembly plant based on transportation costs to the dealer and plant capacity. A serial number is assigned to each vehicle ordered as well as a "build week."

68. Ford employs approximately 350 personnel in Michigan who have overall responsibility for ordering commodities/parts from outside suppliers, including the commodities/parts for Ford's four engine plants, three transmission plants, four casting plants, seven stamping plants, and 18 assembly plants located in the United States.

69. Once the parts are ordered, the Sequencing process begins by sequencing the dealer orders in such a manner as to move it from order status to the point in which assembly of the ordered vehicle will begin.

70. Due to the number of parts that go into any one vehicle, the Sequencing process, in part, monitors the arrival of all commodities and sequences them in such a manner as to build the specified vehicle at a specified time, moving that time from a build week to a specific day, which is then blending into the "build" lineup for assembly.

71. The Build process begins when all the parts needed to build a specific vehicle arrived at the plant and the vehicle is scheduled for production.

72. Once scheduled the assembly plants weld and bolt the various component parts together creating a finished vehicle.

73. The actual assembly of a vehicle at a production facility takes approximately one day.

74. Ford's vehicle Logistics process involves the transportation of vehicles from Ford's assembly plants to the dealers.

75. Generally, with minor variations between each facility's processes, once final testing is completed, assembled vehicles are placed in a designated holding area ("drop zone") where a third party carrier inspects each vehicle.

76. Once inspection is complete, the third party carrier's personnel drive the vehicles out of the drop zone.

77. At the drop zone exit, a bar code scanner reader records and releases the vehicle ("Gate Release").

78. At Gate Release, Ford invoices the dealers and transfers title to the dealer. Ford retains a security interest in the vehicle until payment is made.

79. After Gate Release, the carrier hauls the vehicle to a Rail Ramp where it is placed on a train for shipment to a mixing center or directly to a destination ramp.

80. The mixing centers serve as consolidation points for vehicles from of the assembly plants.

81. The carrier sorts the vehicles by destination and loads them onto trains for shipment to their respective destination ramps.

82. The destination ramp for vehicles purchased by Tacoma dealers is located in Kent, Washington.

83. At the destination ramp, the carrier offloads the trains and loads the vehicles onto trucks for transport to the destination dealership.

84. When the vehicles arrive at a dealership, an employee of the dealer inspects the vehicles and then signs a bill of lading, acknowledging receipt of the vehicles.

85. Beginning March 1, 2001, an insurance policy, purchased by Ford on behalf of the dealers, covered risk of loss in transit. The insurance policy names

the dealer as the insured and Ford as the agent for the insured.

86. Repair of defects or in-transit damage not covered by insurance is handled as a warranty claim as address in Ford's Warranty and Policy Manual.

87. Ford's activities and involvement with dealerships includes marketing and customer satisfaction assistance.

88. Ford's Market Representation Manager, whose responsibilities include managing the dealer Sales and Service Agreements for all Ford and Lincoln-Mercury dealers within the region, most recently visited Titus-Will Ford in Tacoma in 2004, at which time Ford presented to the dealership a market study the company commissioned of the Tacoma metropolitan area.

89. Ford attempts to conduct such studies for major markets approximately every two to three years.

90. The Market Representation Manager typically visits the Titus-Will Ford and Mallon Ford dealerships in Tacoma once a year or less.

91. A Regional Manager has overall responsibility for Lincoln and Mercury dealers within the Northwest Region. The Region Manager's work is mostly performed at the regional office in Bellevue.

92. Ford's Customer Service Division personnel are responsible for consulting with dealers on issues

regarding parts and service, as well as monitoring dealer warranty claims experience, customer satisfaction with dealer parts and service departments, and growth of dealer parts and service operations.

93. During the audit period and continuing to the present, the Customer Service Zone Manager visited the Tacoma dealerships as frequently as weekly and at least once a month for parts issues, customer satisfaction issues, damaged freight issues, and Ford incentives and programs.

94. During the audit period and continuing to the present, Ford provided a warranty on all of its new vehicles.

95. During the audit period and continuing to the present, the Tacoma dealerships performed warranty work pursuant to the Sales and Service Agreements and Warranty and Policy Manual, and Ford reimbursed the dealerships for such work, including parts and labor costs.

96. Customer Service Division Field Service Engineers travel to Tacoma dealerships approximately once per year to provide in-person advice on repair and service issues.

97. During the audit period and continuing to the present, Ford generates a Certificate of Origin for a Vehicle ("COV") for newly manufactured vehicles and invoices the dealer when a vehicle is "bucked" (when all the parts for a specific vehicle have arrived at the plant and the vehicle's assembly is imminent,

generally the same day that the vehicle is assembled).

98 The invoice and COV are mailed to the dealer from Troy, Michigan.

99. For the audit period occurring before November 13, 2000, Ford's Sales and Service Agreements called for payment of the invoice at gate release.

100. For periods on and after November 13, 2000, the terms of payment were revised to provide for payment of invoices upon arrival of the vehicle at the dealership, however, the dealer's floor plan line of credit may actually be drafted a few days either before or after the vehicle arrives at the dealership.

101. Ford obtained payment by drafting against the dealer's floor plan line of credit (the dealers authorize Ford to debit their floor plan credit lines to pay vehicle invoices).

DATED: June 9, 2005.

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FORD MOTOR COMPANY,
Petitioner,
v.
THE CITY OF SEATTLE,
Respondent.

FORD MOTOR COMPANY,
Petitioner,
v.
THE CITY OF TACOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

RESPONDENTS' BRIEF IN OPPOSITION

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case concerns taxation of a business engaged in wholesale sales of vehicles and parts delivered to the Cities of Seattle and Tacoma ("Cities"). The Washington Supreme Court's decision upholding the taxes at issue is correct and consistent with federal and state precedent, including this Court's decision in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987). No further review is warranted.

1. The Cities' Tax Systems. The Cities impose a business and occupation ("B&O") tax on all persons engaging in business activity within the City. Seattle Mun. Code ("SMC") 5.44.400; SMC 5.45.050; Tacoma Mun. Code ("TMC") 6.68.220(B).[1] The taxes are not imposed on income (an "income tax") or on retail sales (a "sales tax"). Instead, the taxes are B&O taxes, a form of gross receipts taxes, imposed "for 'the privilege of doing business' in a particular jurisdiction." Pet. App. 5a-6a; *see* Wash. Rev. Code §35.102.030(3); Paul J. Hartman, *Federal Limitations on State & Local Taxation*, § 9:1, p. 211 (2d ed. 2003).

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[1] During the audit period, Seattle reorganized and amended its tax code, although the effect of the relevant provisions did not change. For the portion of the audit period through December 31, 2001, SMC ch. 5.44 governs. In addition, all references to the Tacoma ordinances are to those in effect during the audit period.

The Cities define "engaging in business" broadly to include any business activity which is carried on within the City. SMC 5.44.022(8); SMC 5.30.030(B); TMC 6.68.130. When a seller has a sufficient nexus with the Cities, and delivery to the purchaser occurs in the Cities, the Cities measure the tax by 100 percent of the gross proceeds from the wholesale sale of those goods within the Cities. Pet. App. 13a; SMC 5.44.422(A), 5.45.050(C), 5.45.080(B); Seattle Bus. Tax R. 5-44-193A(3); SMC § 5.44.400(C); TMC 6.68.220(B), Tacoma Tax R. 103, 193-B.

The State of Washington taxes interstate sales of goods in exactly the same way: delivery and receipt of the goods by the purchaser must occur in Washington. Wash. Admin. Code § 458-20-193(7). When these events occur in Washington, the state measures the tax by 100 percent of the gross proceeds of the sale. Wash. Rev. Code § 82.04.270. As with the Cities, the State of Washington does not tax the wholesale sale of goods that are delivered and accepted outside Washington. Wash. Admin. Code § 458-20-193.

2. Ford's Activities. Ford sells new vehicles to a network of independently-owned dealers throughout the United States, including dealers in the Cities. Ford conducts extensive activities in Seattle and Tacoma related to the wholesale sale of vehicles to its dealers. These activities include advertising, meeting with dealers, imparting information about new products, discussing problems and customer satisfaction concerns, and marketing and selling warranties on its automobiles. Pet. App. 2a. All of these activities are for the purpose of selling Ford products to dealers located in the Cities

and helping those dealers sell Ford products to retail customers. *Id.*

Once the vehicles are manufactured, Ford or its representative arranges for the vehicles to be delivered to the dealer's facilities in Tacoma and Seattle. The dealer receives and accepts the vehicles at the dealer's lot.

Ford concedes that it engages in wholesaling activities in the Cities, and that these activities are sufficient to establish a taxable presence that allows the City to impose a wholesaling B&O tax. Pet. 5, n.4. In addition, it is undisputed that the Cities do not include all of Ford's sales in the measure of the tax. Ford is a large corporation with sales to dealers in many states and other countries. The Cities tax only the gross receipts from sales of goods delivered to dealers located in the Cities. Pet. App. 13a; SMC 5.44.400(C), 5.44.422A, 5.45.080A; TMC 6.68.220(B); Tacoma Tax R. 103, 193-B.

REASONS FOR DENYING THE PETITION

I. The Washington Court's Decision Does Not Conflict With Decisions From Other States.

Contrary to Ford's assertions, the Washington Supreme Court's decision does not conflict with decisions of other state courts of last resort. Ford has not cited any case (and the Cities are aware of none) in which a federal court of appeals or a state supreme court has interpreted the Commerce Clause to prohibit a city or state from imposing a B&O tax measured by 100 percent of gross receipts from

interstate sales of goods delivered to and accepted in the taxing jurisdiction.

There is no conflict between the decision in this case and *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996). In arguing to the contrary, Ford overlooks a critical factual distinction between the two cases. In *Winchester,* the city sought to tax the entire gross revenue of a company that operated 24 facilities in 13 states, merely because the company's headquarters was located in Winchester. Unlike Winchester, the Cities limit the measure of their B&O taxes to goods delivered and accepted in the Cities. Similarly, in *M & Associates, Inc. v. City of Irondale,* 725 So.2d 592 (Ala. 1998), the City of Irondale sought to tax gross receipts from all of the taxpayer's sales, including interstate sales of goods delivered outside the city. Here, in contrast, the Cities' taxes are limited to interstate sales of goods delivered in the Cities.

Ford also cites two decisions of the Pennsylvania Supreme Court that do not conflict (let alone "squarely" conflict, *see* Pet. 11) with the decision in this case. In *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003), only three of the seven justices joined the portion of the Court's opinion holding that the Commerce Clause required apportionment of the tax at issue. *Id.* at 113. Moreover, *Philadelphia Eagles* concerned a tax on royalties earned from media contracts, not a tax on the sale of goods. The City of Philadelphia tax code distinguishes between a tax on royalties and a tax on making wholesale sales of goods. *See* Philadelphia Bus. Privilege Tax

Regulations §§ 304, 310, 222. In *Philadelphia Eagles*, the court addressed only the portion of the city tax code dealing with royalty income, and did not address the city's tax on selling tangible personal property. Indeed, the court recognized the longstanding precedent that further apportionment of gross proceeds from interstate sales of goods is not required because only the destination state taxes the selling activities. *Philadelphia Eagles*, 823 A.2d at 129. The Pennsylvania court commented that in imposing a wholesaling B&O tax on the sale of goods, "the state of destination can tax that selling activity, without the risk of multiple taxation for the same activity."[2] *Id.*

In fact, the City of Philadelphia taxes companies selling goods delivered to Philadelphia in the same way that the Cities taxed Ford. The City of Philadelphia imposes its business privilege tax upon the gross receipts of "every person engaging in any business in the City of Philadelphia." *Philadelphia Eagles*, 823 A.2d at 113; Philadelphia Code

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[2] Some courts have held that a wholesaling B&O tax on 100 percent of the gross proceeds from the sales of goods is inherently apportioned by virtue of permitting only the destination jurisdiction to impose such a tax. *See Standard Press Steel Co. v. Dep't of Revenue*, 419 U.S. 560, 564 (1975). Other courts characterize a tax imposed on 100 percent of the gross proceeds from the sales of goods as appropriate but "unapportioned." *See General Motors Corp. v. Washington*, 377 U.S. 436, 448 (1964). Both characterizations lead to the same result; a destination city can impose a wholesaling B&O tax on 100 percent of the gross proceeds from the sales of goods delivered and accepted in that jurisdiction. *See* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance & Procedure*, § 13.6 at 525 (4th ed. 2007).

§ 19-2603(1). All receipts from the sale of goods delivered into the City of Philadelphia are included in taxable receipts. Philadelphia Bus. Privilege Tax Reg. § 304(1). As in the Cities here, receipts from sales of goods delivered outside Philadelphia are excluded from taxable receipts. *Id.* Thus, contrary to Ford's contention, the *Philadelphia Eagles* decision is consistent with the Washington Supreme Court's decision in *Ford*.

The Pennsylvania court's decision in *Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004), is distinguishable on the same grounds. Upper Moreland Township sought to tax receipts for construction services, including services provided outside the Township (and outside the state of Pennsylvania). The Pennsylvania court rejected the argument that the Northwood Construction Company's "maintenance of its primary business office in the Township permits the Township to tax 100% of Northwood's receipts generated in connection with interstate activity." *Id.* at 804. Thus, the Pennsylvania court did not hold that a B&O tax on sales of goods delivered to purchasers in the Township must be apportioned beyond where the goods are delivered.

Ford also cites *Southern Pacific Transportation Co. v. Arizona*, 44 P.3d 1006 (Ariz. App. 2002), a decision of Arizona's intermediate court of appeals. The tax at issue in *Southern Pacific*, like the tax in *Philadelphia Eagles*, was a tax on the sale of services rather than goods. If the taxpayer in *Southern Pacific* had made retail sales of tangible personal property delivered to the state, those sales

would have been subject to Arizona's transaction tax and measured by 100 percent of the gross receipts. Ariz. Rev. Stat. §§ 42-5008 42-5061(A). Furthermore, the court's discussion of the Commerce Clause was unnecessary to its decision, because it ultimately held that the legislature did not intend to tax transportation services performed over interstate routes. *Southern Pacific*, 44 P.3d at 1017. Thus, the decision in *Southern Pacific*, like the other decisions cited by Ford, does not conflict with the Washington Supreme Court's decision below.

Finally, Ford's reliance on *General Motors Corp. v. City & County of Denver*, 990 P.2d 59 (Colo. 1999), also is misplaced. The tax at issue in that case was a use tax, not a B&O tax. *Id.* at 65.

In sum, Ford cites no case in which the highest court of a state has held that the Commerce Clause prohibits a city from imposing a wholesaling B&O tax on 100 percent of the gross receipts from interstate sales of goods by a company that has a taxable nexus with the city, and where the goods are delivered to the city. Consequently, there is no conflict that warrants review by this Court.[3]

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[3] As noted above, Ford concedes that it has a taxable presence in the Cities, and that it is subject to the Cities' B&O tax. Pet. 5 n.4. Although Ford notes that it entered into contracts with its dealers providing that title to the vehicles passes at the vehicle assembly plant, it is undisputed that the vehicles are physically delivered to and accepted at the dealers' facilities in the Cities. Pet. 6; Brief of Respondent City of Seattle to Wash. State Supreme Court pp. 6-7; Brief of Respondent City of Tacoma to Wash. Supreme Court p. 6. *See General Motors Corp. v. Washington*, 376 P.2d 843 (Wash. 1962), *aff'd*, 377 U.S. (...continued)

II. The Washington Supreme Court Decision Is Consistent With This Court's Decisions On Apportionment Of Gross Receipts Taxes On Sales Of Goods.

For over a century, this Court has upheld the nondiscriminatory gross receipts taxes on interstate sales of goods imposed by the state of destination. *See Tyler Pipe Indus., Inc. v. Washington Department of Rev.*, 483 U.S. 232 (1987); *Standard Pressed Steel Co. v. Dept. of Revenue*, 419 U.S. 560 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Field Enters., Inc. v. Washington*, 352 U.S. 806 (1956), *aff'd per curiam* 289 P.2d 1010 (Wash. 1955); *Norton Co. v. Dep't of Rev.*, 340 U.S. 534 (1951); *Int'l Harvester Co. v. Dep't of Treasury*, 322 U.S. 340 (1944); *Allied Mills, Inc. v. Dep't of Treasury*, 318 U.S. 740 (1943), *aff'g per curiam* 42 N.E.2d 34 (Ind. 1942); *Dep't of Treasury v. Wood Preserving Corp.*, 313 U.S. 62 (1941); *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1886). This issue is well-settled.

Two decades ago, Ford made the same argument it is making here, and this Court rejected it. *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987).[4] Like the Cities, the

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436 (1964) (taxpayer cannot control the location of sales of its vehicles, and avoid state and local taxation, by contract).

[4] Ford was one of more than 50 plaintiffs whose cases were consolidated in the state court actions that resulted in this Court's *Tyler Pipe* decision. *See National Can Corp. v. Washington State Dep't of Revenue*, No. 85-2006, Joint Statement, App. F.

State of Washington imposes a wholesaling B&O tax on persons making wholesale sales within the state. Washington measures this tax based upon 100 percent of the gross receipts on all wholesale sales of goods delivered in the state. Wash. Rev. Code § 82.04.270; Wash. Admin. Code § 458-20-103. In *Tyler Pipe*, this Court considered the argument of Ford and the other taxpayers that Washington inappropriately imposed a wholesaling B&O tax on 100 percent of gross receipts of products delivered in Washington even where some sales activity occurred in other states. *See* No. 85-2006, *Nat'l Can Corp v. Washington State Dep't of Revenue*, Br. of Appellant 13; No. 85-1963, *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, Reply Br. of Appellant 7.

This Court unanimously rejected Ford's argument and held that Washington's wholesaling B&O taxes are fairly apportioned:

> [T]he activity of wholesaling-whether by an in-state or an out-of-state manufacturer must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax. *See Moorman Mfg. Co. v. Bair*, 437 U.S., at 280-281, 98 S.Ct., at 2348-2349 (gross receipts tax on sales to customers within State would be "plainly valid"); *Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S., at 564 (selling tax measured by gross proceeds of sales is "apportioned exactly to the activities taxed").

Tyler Pipe, 438 U.S. at 251; *see also* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance & Procedure*, § 13.6 at 525 (4th ed. 2007). The tax was inherently apportioned because it applied only to sales of goods delivered to customers in the state.

The Cities' wholesaling taxes are identical in all relevant respects to the state of Washington's wholesaling tax at issue in *Tyler Pipe*. The Cities' taxes are measured by 100 percent of gross proceeds of sales if a taxpayer has a taxable nexus with the state and the goods are received by the buyer in Washington. Therefore, the Washington State Supreme Court's decision in this case is in accord with this Court's precedents that a tax on interstate sales measured by 100 percent of gross proceeds of sales is "apportioned exactly to the activities taxed." *Tyler Pipe*, 483 U.S. at 251, *quoting Standard Pressed Steel*, 419 U.S. at 564.

Tyler Pipe considered both manufacturing and wholesaling activities, but its central holding is that Washington State's wholesaling B&O tax based on 100 percent of the gross receipts of sales in Washington is valid even though some of the activities related to the sales took place in other states. Ford attempts to distinguish *Tyler Pipe* from this case on the ground that "substantially all of the taxpayer's wholesaling activities took place within the State." Pet. 21. But as this Court noted, "Tyler maintains no office, owns no property, and has no employees residing in the State of Washington. Its solicitation of business in Washington is directed by executives who maintain their offices out-of-state and by an independent contractor located in Seattle."

Tyler Pipe, 483 U.S. at 249. In this case, moreover, it is undisputed that Ford engaged in substantial wholesaling activities in the Cities, including advertising, sending representatives to meet with dealers and managers, imparting information about new products, discussing problems and customer satisfaction concerns, and marketing and selling warranties. Pet. App. 2a. Ford's attempt to distinguish this case from *Tyler Pipe* is therefore unpersuasive.

The decision below is also consistent with this Court's decisions in *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175 (1995) and *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). In *Jefferson Lines*, a case upon which Ford relies, the Court upheld Oklahoma's *retail sales* tax on the full price of a ticket for interstate transportation services. 514 U.S. at 200. In so holding, the Court did not overrule or question *Tyler Pipe*, or the Court's other decisions concerning B&O taxes imposed on sales of goods. Indeed, the Court cited *Tyler Pipe* and *International Harvester* without questioning either their holdings or their reasoning. *See id.* at 189, 192 n.6.[5]

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[5] In *Central Greyhound*, decided prior to *Tyler Pipe*, the Court held that a gross receipts tax on bus transportation services—not a wholesale sale of goods—must be apportioned. Because *Central Greyhound* dealt with a gross receipts tax and not a sales tax, this Court in *Jefferson Lines* stated that "*Central Greyhound* provides the wrong analogy for answering the sales tax apportionment question. . . ." *Jefferson Lines*, 514 U.S. at 190. Thus, neither *Central Greyhound* nor *Jefferson Lines* requires the Court to reconsider its decision in *Tyler Pipe*.

Since Ford's argument was rejected in *Tyler Pipe*, Ford has continued to urge this Court to reconsider the apportionment issue and overrule *Tyler Pipe*. In two companion cases, Ford and other taxpayers petitioned this Court for a writ of certiorari, in part, on the issue of whether Washington State's wholesaling B&O tax was properly apportioned. The Court denied their petitions. *See W. R. Grace & Co.-Connecticut v. Washington Dep't of Revenue*, 528 U.S. 950 (1999); No. 99-38, *Buffelen Woodworking Co. v. Dep't of Revenue*, Pet. ii. In *W.R. Grace*, the Washington Supreme Court rejected as "meritless" the taxpayers' argument that this Court's decision in *Jefferson Lines* signaled a change in the law concerning apportionment of gross receipts taxes on sales of goods. *W.R. Grace & Co. v. Dep't of Revenue*, 973 P.2d 1011, 1018 (Wash. 1999). Ford is making the same argument in this case.

More recently, this Court denied a petition for writ of certiorari in a substantially similar case against Seattle. General Motors Corporation challenged Seattle's wholesaling B&O tax claiming that, under *Jefferson Lines*, Seattle should apportion General Motors' income based on sales activity occurring outside the state. *General Motors Corp. v. City of Seattle*, 25 P.3d 1022, 1030-1032 (Wash. App. 2001), *cert. denied*, 535 U.S. 1056 (2002). The Court should deny the petition in this case, just as it denied the petitions in *General Motors* and *W.R. Grace*.

III. Courts And Legislatures Have Long Recognized The Right Of The Destination Jurisdiction To Impose A Gross Receipts Tax On Interstate Sales Of Goods.

There are several additional reasons for the Court to deny the petition in this case. *First*, Ford has not shown that it is subject to multiple taxation. Because tangible personal property is delivered in only one location, Ford does not pay a wholesaling B&O tax to any jurisdiction other than the Cities.[6]

Second, effective January 1, 2008, Washington State law requires cities that impose wholesaling B&O taxes to apportion gross income based on where the goods are delivered. Wash. Rev. Code § 35.102.130 ("Gross income derived from all activities other than those taxed as service or royalties shall be allocated to the location where the activity takes place. . . . In the case of sales of tangible personal property, the activity takes place where delivery to the buyer occurs.") Thus, the Cities are now *required* by a state law – which is not at issue in this case – to impose their wholesaling

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[6] Moreover, both Seattle and Tacoma offer a deduction in certain circumstances against the wholesaling B&O taxes paid to the Cities. The deduction provides: "A taxpayer that has paid an eligible gross receipts tax with respect to a sale of goods or services, to a jurisdiction in which the goods are delivered or the services are provided, may deduct an amount equal to the gross receipts used to measure the tax from the measure of the tax owed to the City." *See* SMC 5.45.075; TMC 6.68.075. Ford has not sought to claim the deduction in this case, presumably because it is only paying wholesaling B&O taxes where the vehicles and parts are delivered. Nevertheless, the deductions provide further protection from double taxation.

B&O tax on Ford based on where the goods are delivered to the buyer.

Third, and more generally, Ford is asking this Court to alter the way in which states and cities have imposed wholesaling B&O taxes for more than a century. The concern for maintaining the stability of the law "counsels adherence to settled precedent." *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992). Moreover, "[t]he Constitution gives that branch of government [Congress] the power to regulate commerce among the states, and until it acts . . . we should enter the field with extreme caution." *General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) (*quoting Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (1944) (Black, J., concurring)); *see also Quill Corp.*, 504 U.S. at 318 (concluding that burden on interstate commerce is "not only [a determination] that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve").

Ford objects to the existing system that permits the destination jurisdiction to tax interstate wholesale sales and seeks to replace it with an apportionment system involving the originating location, the delivery location, and any other location where any activity related to the sale occurs. The apportionment system sought by Ford would introduce new complexities for taxpayers and taxing authorities. Moreover, Ford's proposal would upset the present system by requiring wholesale sellers to pay wholesaling B&O tax to the state or city of origin.

Requiring cities and states to apportion sales of goods would not prevent double taxation unless

the Court imposed the same apportionment system on all taxing authorities. In fact, in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), this Court upheld an apportionment method that assigned the sales to only the state of destination and recognized that a taxpayer's request to mandate apportionment to prevent double taxation would "require extensive judicial lawmaking." *Id.* at 278-79. This Court declined to do so and stated "It is to [Congress], and not this Court, that the Constitution has committed such policy decisions." *Id.; see* Hartman, *Federal Limitations on State & Local Taxation*, § 9:4, p. 235.

The arguments for adhering to existing precedent are especially strong where Congress has long been aware of a common taxing practice and has taken no action to forbid it. As this Court observed more than 125 years ago, "[t]he long continued silence of Congress, with its plenary power, in the presence of [legislation] . . . is itself an implied ratification and adoption, and is equivalent in its consequences to an express declaration to that effect." *Wilson v. McNamee*, 102 U.S. 572, 575 (1881); *see also General Motors Corp.*, 519 U.S. at 305 (concluding that Congress' failure to alter a longstanding state practice indicates that Congress believes the practice to be "within the realm of what the States may reasonably promote and preserve").

That is exactly the situation here. More than 40 years ago, Congress recognized that courts were permitting interstate sales to be taxed by the state or city of destination. In 1959, Congress directed both the Committee on the Judiciary of the House of Representatives and the Committee on Finance of the Senate to make a full and complete study of "all

matters pertaining to the taxation by the States of income . . . from the conduct of business activities which are . . . a part of interstate commerce." Pub. L. 86-272, § 201, 73 Stat. 555, 556 (1959). The resulting reports of the Special Subcommittee on State Taxation of Interstate Commerce were presented to Congress in 1964 and 1965. The committee confirmed that courts permitted the states of destination to tax interstate sales. Special Subcommittee on State Taxation of Interstate Commerce, Committee on the Judiciary, House of Representatives, State Taxation of Interstate Commerce, H.R. Rep. No. 88-1480, pt. 3, at 681-82, 1042-46, 1060, 1081 (1964). Despite this recognition, Congress has done nothing to change the law. *See* Hartman, *Federal Limitations on State & Local Taxation*, § 9:4, p. 231, n.25. In its report, Congress found that the application of an apportionment formula to gross receipts taxation would "constitute a departure from the present practice" and "would seriously conflict with the structure of gross receipts taxation." H.R. Rep. No. 88-1480, pt. 3, at 1113 (1964).[7]

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[7] Ford asserts that the question it presents is "of great and growing national importance" because "nearly 1,200 counties, cities, towns, and other state political subdivisions impose business activities taxes on gross receipts derived from operations carried on within their localities." Pet. 18. But in 1964, Congress noted that at least 1,000 local jurisdictions imposed a gross receipts tax. H.R. Rep. No. 88-1480, pt. 3, at 1067, 1091. Rather than asking the Court to review a new phenomenon, Ford is seeking to overturn long-established practice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

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Petitioner,

v.

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Respondent.

FORD MOTOR COMPANY,

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v.

CITY OF TACOMA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

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REPLY BRIEF FOR PETITIONER

I. RESPONDENTS' READING OF *TYLER PIPE* EVISCERATES THE FAIR APPORTIONMENT REQUIREMENT.

Respondents' Brief in Opposition, like the decision below, rests on an overbroad reading of *Tyler Pipe* that, on the undisputed facts of this case, makes a mockery of the fair apportionment requirement. Despite this Court's declaration in *Jefferson Lines* that a gross receipts tax on business activities is a "variety of tax on income, which [is]

required to be apportioned to reflect the location of the various interstate activities by which it was earned" (514 U.S. at 190), respondents unabashedly defend the unapportioned taxes they have imposed on *all* of the receipts from Ford's interstate wholesaling activities, even though *none* of the actual sales giving rise to those receipts occurred within the Cities.

The principal support for this extreme position is the statement in *Tyler Pipe* that "the activity of wholesaling – whether by an in-state or an out-of-state manufacturer – must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Tyler Pipe*, 483 U.S. at 251. Respondents' reading of *Tyler Pipe* is not correct for several reasons.

First, this Court's *sole* focus in *Tyler Pipe* was on the question of whether "manufacturing" and "wholesaling" were a single "unitary" activity such that a tax on in-state wholesaling activities had to be apportioned to take into account out-of-state manufacturing activities. This Court's observation that wholesaling is a "separate activity" responded directly to the taxpayer's "erroneous assumption that ...Washington is taxing the *unitary* activity of manufacturing and wholesaling." 483 U.S. at 251 (emphasis added). Thus, this Court concluded that it was not appropriate to apportion the receipts derived from "separate" in-state wholesaling to reflect "separate" out-of-state manufacturing that might be taxed by another State.

Second, there are critical distinctions between the facts and records of *Tyler Pipe* and this case that reinforce the limitations on this Court's statement in *Tyler Pipe*. In that case, all of the wholesale sales and virtually all of the wholesaling activities presented in the record took place within the taxing jurisdiction. 483 U.S. at 249-50. Here, by contrast, as respondents acknowledge, none of the wholesale sales and very few of the wholesaling activities occurred within the taxing jurisdictions. App. 101a-109a; Br. Opp. 2.

Moreover, in *Tyler Pipe*, the taxpayer made no effort to justify apportionment based on any out-of-state wholesaling activity it may have undertaken. Here, in stark contrast, there is extensive record evidence detailing the substantial out-of-state wholesaling activity undertaken by petitioner with respect to which apportionment is clearly appropriate. App. 32a-34a; 100a-112a. In short, when this Court stated in *Tyler Pipe* that wholesaling activity is a separate activity "conducted wholly within Washington," that statement must necessarily have referred only to the facts of the case before it. The instant case establishes beyond doubt that taxable "wholesaling" activities that result in the shipment of goods to local customers can and in fact do take place in multiple jurisdictions.[1]

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[1] Respondents' suggestion that "[t]wo decades ago, Ford made the same argument it is making here" (Br. Opp. 8), because it "was one of more than 50 plaintiffs whose cases were consolidated in the state court actions that resulted in this Court's *Tyler Pipe* decision" (*id.* at n.4), is wrong on two counts. Not only was the apportionment argument advanced here never advanced in *Tyler Pipe* for the reasons set forth above,

Finally, and most fundamentally, an elevation of *Tyler Pipe*'s context-specific observation into a general rule of law that "wholesaling" must in all circumstances be viewed as an activity conducted "wholly within" a single State, and that "no other State has jurisdiction to tax" such activity, is a retreat into the very formalism having "no relationship to economic realities" that this Court was determined to abandon in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). Indeed, to suggest that Michigan, or any other State where petitioner transfers title to the vehicles it sells to dealers located in the Cities, has no "jurisdiction to tax" the portion of petitioner's wholesaling activity that indisputably occurs within that State not only would ignore "economic realities," it would constitute novel law as well.

In short, respondents' position is that gross receipts taxes on business activities need not be apportioned when they are measured by receipts from the sale of goods shipped into a taxing jurisdiction where some wholesaling activities occurred, regardless of the extent of the out-of-state wholesaling activities (including the sale itself) that resulted in those shipments. That position simply cannot be reconciled with the bedrock principle that a business gross receipts tax is "required to be apportioned to reflect the location of the various interstate activities by which it was earned."

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but Ford was not involved in the apportionment controversy in *Tyler Pipe*. Its involvement was limited to the taxpayers' successful challenge to the "multiple activities" exemption in Washington's gross receipts tax, which this Court struck down because it discriminated against interstate commerce.

Jefferson Lines, 514 U.S. at 190. Only if the Cities are limited to taxing their fair share of the sales receipts, reflecting only that portion of the interstate wholesaling activities that occur within their respective jurisdictions, can one avoid the "opportunities . . . for multiple taxation of the same taxpayer" that this Court said must be avoided when interstate commerce is being taxed. *Id.* *See also id.* at 184 (". . .multiple taxation. . .is threatened whenever one State's act of overreaching combines with the *possibility* that another State will claim its fair share of the value taxed . . . .") (emphasis added).

At the very least, if there is any prospect that respondents' reading of *Tyler Pipe*, rather than petitioner's reading of *Jefferson Lines*, accurately reflects the current state of Commerce Clause jurisprudence with respect to gross receipts taxation of interstate commercial activity, it is incumbent upon this Court to clear up the existing uncertainty over this question.

II. THERE IS NO EXCEPTION TO *JEFFERSON LINES'* APPORTIONMENT REQUIREMENT FOR A GROSS RECEIPTS TAX ON BUSINESS ACTIVITIES WHEN THE TAX IS MEASURED BY RECEIPTS FROM THE SALE OF GOODS .

A. *Jefferson Lines* Did Not Recognize an Exception to the Apportionment Requirement It Articulated

This Court's declaration in *Jefferson Lines* that a gross receipts tax on business activities is "simply a variety of tax on income, which [is]

required to be apportioned to reflect the location of the various interstate activities by which it was earned," does not contemplate any exception for taxes measured by receipts from the sale of goods merely because they are shipped into the taxing jurisdiction. *That is particularly so in a case like this, where the actual sales of the goods and most of the wholesaling activities associated with those sales occurred in other States.*

First, nothing in this Court's language in *Jefferson Lines* suggests any such exception.

Second, this Court's elaboration on the reason for the rule belies the existence of such an exception. This Court drew a sharp line between sales taxes, like the tax at issue in *Jefferson Lines*, and business gross receipts taxes, like the tax at issue here. This Court observed that a sales tax on goods or services is a tax on a "discrete" (*id.* at 186) or "local" (*id.* at 188) "event" (*id.* at 186, 188), with the tax falling on the purchaser on a transaction-by-transaction basis, and with no appreciable risk of multiple taxation. Consequently, this Court has "consistently approved taxation of sales without any division of the tax among different States . . . ." *Id.* at 186.

By contrast, this Court further observed, a business gross receipts tax falls on the "seller-taxpayer" (*id.* at 190), not with respect to a discrete, geographically identifiable "event," but rather with respect to a series of activities that may cross state lines. In these circumstances, there are "consequent opportunities . . . for multiple taxation of the same taxpayer" (*id.* at 190) and the tax is "required to be apportioned to reflect the location of various

interstate activities by which it was earned." *Id.* Nowhere in this analysis is there any room for an exception to the fair apportionment requirement for a business gross receipts tax merely because the measure of the tax is receipts from the sale of goods rather than from the sale of services, especially when as here the wholesaling activities generating those receipts are conducted in multiple states.

Respondents and the majority below attempt to obfuscate this clear distinction. On the one hand, they emphasize that the Cities' taxes are taxes on "business activities," as distinguished from a "sales tax." Br. Opp. 1. Thus "it does not matter in which jurisdiction the actual sales at wholesale occur." App. 9a. On the other hand, and at the very same time, they rely on the sales tax analogy by claiming the right to impose an unapportioned tax "measured by 100 percent of the gross receipts from interstate *sales* of goods *delivered to and accepted in* the taxing jurisdiction." Br. Opp. at 3-4 (emphasis added).[2]

But the Cities cannot have it both ways. Either their tax is an activities tax, which allows them to consider receipts from out-of-state sales in the measure *but requires apportionment of that measure to reflect only the portion of the receipts generated by activity within its borders,* or the tax is

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[2] It is unclear what respondents mean by this phrase (other than "destination") since the record in this case shows that under the terms of the sales contracts, delivery was made at the out-of-state point of origin. In fact, the out-of-state delivery was a major source of the majority's rift with the dissent causing the majority to expressly hold that, "it does not matter in which jurisdiction the actual sales at wholesale occur." App. 9a.

a sales tax, which can be imposed on an unapportioned basis, *but only when the taxable event is a local event that can occur exclusively within the taxing jurisdiction, thereby avoiding the risk of multiple taxation.* In short, the Cities cannot treat their taxing scheme as a gross receipts tax for purposes of imposing the tax and as a sales tax for purposes of determining whether apportionment is required.

Finally, the constitutional policy underlying the fair apportionment requirement militates against any exception for gross receipts taxes measured by receipts from the out-of-state sale of goods shipped to the taxing jurisdiction. Just as this Court in *Jefferson Lines* found no reason to distinguish between goods and services as to the *lack of an apportionment requirement* for sales tax purposes, because "[a] sale of services can ordinarily be treated as a local state event just as readily as a sale of tangible goods can be located solely within the State of delivery" (514 U.S. at 188), there is also no rational basis for distinguishing between goods and services as to the *existence of an apportionment requirement* for business gross receipts tax purposes.

In *Jefferson Lines*, this Court declared that apportionment was required when a "seller-taxpayer was exposed to gross receipts taxation by New Jersey and Pennsylvania on portions of the same receipts that New York was taxing in their entirety." *Id.* at 190. In the instant case, the "seller-taxpayer" is similarly exposed to taxation by other States on portions of the same receipts that Seattle and Tacoma are taxing in their entirety. The fact that

the tax described in *Jefferson Lines* was measured by gross receipts from the sale of services, while the tax at issue here is measured by gross receipts from the sale of goods, is a distinction without constitutional significance.

B. State Court Decisions Are In Conflict Over the Meaning of *Jefferson Lines*

Respondents' claim that the decision below does not conflict with decisions of other state courts (Br. Opp. 3-7) is predicated on the same faulty premise that underlies its effort to distinguish *Jefferson Lines*, namely, that these cases implicitly recognized an exception to the rule requiring apportionment of gross receipts taxes when the tax is imposed on receipts from the sale of goods shipped into the taxing jurisdiction. In point of fact, these other state court decisions, which uniformly applied *Jefferson Lines* to require apportionment of gross receipts taxes (Pet. 10-14), reflect an understanding of *Jefferson Lines* that is fundamentally at odds with the position of the majority below.

For example, respondents suggest there is no conflict between the decision below and *City of Winchester* because the City of Winchester sought to tax the entire gross receipts of a company that operated in many states and, unlike the Cities here, did not "limit the measure of their . . . taxes to goods delivered . . . in the Cities." Br. Opp. 4. But respondents ignore the essential holding in *City of Winchester*, reflecting this Court's opinion in *Jefferson Lines*, that taxing receipts "from value produced in locations other than in the taxing jurisdiction" (471 S.E.2d at 498) gave rise to a risk of

multiple taxation and a requirement of apportionment. For reasons detailed above, precisely the same risk exists here. That Winchester's overreaching to tax value produced in other locations was even more egregious than the overreaching in question here is of no constitutional significance. The same is true of respondents' effort to distinguish *M & Associates* (Br. Opp. 4), which struck down an Alabama local gross receipts tax similar to the City of Winchester's tax.

Respondents' effort to distinguish *Philadelphia Eagles* on the ground that it involved a "tax on royalties earned from media contracts, not a tax on the sale of goods" (Br. Opp.4) fails on two counts. First, it relies on a distinction between goods and services that, as discussed above, has no constitutional significance. Second, it contradicts respondents' own characterization of the Cities' taxes at issue here, which respondents strenuously insist are taxes on "business activity," not on the "sale of goods." Br. Opp. 1-3.

Respondents' discounting of the *Northwood* and *Southern Pacific* cases suffers from similar defects. Both of those cases explicitly recognized *Jefferson Lines'* requirement that "gross receipts taxes . . . must be apportioned to comply with the dormant Commerce Clause." *Southern Pacific*, 44 P.3d at 1014; *accord*, *Northwood*, 856 A.2d at 804-05; *see* Pet. 12-14. Respondents' only riposte is that those cases involved gross receipts taxes on services rather than goods (Br. Opp. 6-7), and their unsubstantiated assertion that, if the cases had involved goods, the taxing jurisdictions would have taken the same constitutionally questionable

approach to taxing petitioner that the Cities take here. Br. Opp. 5, 7.

III. RESPONDENTS' OTHER ARGUMENTS FOR DENYING REVIEW LACK SUBSTANCE

A. Petitioner Is Not Seeking Judicial Imposition of a Particular Apportionment Formula on the Cities

Respondents contend that petitioner is seeking to replace the Cities' unapportioned tax with "an apportionment system involving the originating location, the delivery location, and any other location where any other activity related to the sale occurs." Br. Opp. 14. Respondents claim this would not prevent double taxation "unless the Court imposed the same apportionment system on all taxing authorities." *Id.* at 14-15.

To the contrary, petitioner is not insisting on any particular apportionment methodology; indeed, it suggested a number of alternatives in the trial court. Affidavit of Christopher Mucke in Opposition to Seattle's Motion for Partial Summary Judgment, Seattle CP 360; Affidavit of Christopher Mucke in Opposition to Tacoma's Motion for Partial Summary Judgment, Tacoma Tr. Ex. 5. Petitioner also recognizes that different jurisdictions may use different apportionment formulas. What petitioner does not accept – and what it should not be constitutionally required to accept – is the substantial risk of multiple taxation that inexorably arises from a taxing jurisdiction's *absolute* refusal to apportion the gross receipts derived from interstate

business activity. It is the Cities' refusal to recognize *any* claim of other jurisdictions to tax that portion of the receipts attributable to economic activity occurring in their jurisdictions that renders the Cities' tax regimes constitutionally unacceptable.

B. The Purported Relief That the Cities Provide From Double Taxation Is Illusory

The Cities contend that they offer a deduction that purportedly relieves taxpayers engaged in interstate commerce from the double taxation to which they may be subjected as a result of taxes imposed on the same receipts that the Cities seek to tax on an unapportioned basis. The deduction provides:

> A taxpayer that has paid an eligible gross receipts tax with respect to a sale of goods . . . *to a jurisdiction in which the goods are delivered* . . . may deduct an amount equal to the gross receipts used to measure the tax from the measure of the tax owed to the City.

Br. Opp. 13, n.6 (quoting Seattle and Tacoma codes) (emphasis added).

This deduction is illusory. Under respondents' view of the case, because physical delivery occurs in the Cities, the risk of multiple taxation can arise *only* with respect to that portion of petitioner's gross receipts that reflect wholesaling activity carried on in jurisdictions where the goods *are not* delivered. But the deduction is specifically conditioned on

delivery in another jurisdiction. The deduction thus provides no possible relief for petitioner here.

Moreover, by allowing a deduction when delivery occurs elsewhere, respondents must believe they are entitled to impose their "activities" tax even when the goods are *not* delivered in their jurisdictions. Delivery therefore cannot be the "winner take all" element that respondents claim it to be.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

CITY OF SEATTLE, EXECUTIVE SERVICES DEPARTMENT,
Respondent.

FORD MOTOR COMPANY,
Petitioner,

v.

CITY OF TACOMA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION, NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION, NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF *AMICI CURIAE*

This brief *amici curiae* in support of Petitioner ("Ford") is filed on behalf of the Council On State Taxation ("COST"), the National Association of Manufacturers ("NAM"), and the Chamber of Commerce of the United States of America ("Chamber").[1]

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days

COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

The Chamber is the world's largest business federation. The Chamber's underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the nation's business community.

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prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Amici's members' interest in this case is both specific and general. Many *amici* members conduct business in Washington cities and pay business activity taxes. The decision of the Washington Supreme Court that an unapportioned gross receipts tax is constitutional raises a risk that Washington cities may attempt to allocate other types of receipts entirely to their taxing jurisdiction. Like a pathogen, this could quickly spread to other states and localities within those states. Such an unconstitutional extension of the cities' taxing jurisdiction threatens the fiscal balance of many of *amici*'s members' tax liability.

On a broader level, the decision adversely affects all *amici* members because unapportioned, unconstitutional local taxes continue to be a problem in other jurisdictions. *Amici* have witnessed a tremendous growth in the use of gross receipts taxes. Gross receipts taxes that are neither apportioned nor fairly apportioned by a state or local taxing jurisdiction can lead to unjust results. Thus, *amici*'s members have a strong interest in the Court mandating that states and local governments fairly apportion gross receipts taxes imposed on the privilege of doing business. Without the Court's guidance, businesses will be subject to an increasing number of unapportioned business taxes, resulting in multiple taxes with a potential multiplier as high as the number of jurisdictions in which a business is subject to tax. By granting the Petition for Certiorari, this Court can clarify the extent that state and local governments can impose their business activity taxes.

STATEMENT OF THE CASE

The Cities of Seattle and Tacoma ("Cities") each impose a business activity tax on the privilege of engaging in business within their respective City. Among the activities taxed by both Cities is the wholesaling of goods. The tax on wholesaling is measured by the entire gross receipts received from wholesale sales of goods delivered to locations in the Cities, regardless of where the actual sales, including title transfer, occur.

Ford's wholesaling activities that ultimately result in the receipt of a vehicle by a Seattle or Tacoma dealer include a multiple-step order process, most of which occurs outside of the Cities and the State of Washington. Ford challenged the validity of the tax on various state and federal grounds, including a Commerce Clause claim that each City's business activity tax unduly burdens interstate commerce by failing to fairly apportion the tax to Ford's activities conducted within the City. By a narrow 5–4 majority, the Washington Supreme Court ultimately rejected Ford's Commerce Clause claim.

SUMMARY OF ARGUMENT

The Court should grant review in this case because the rule for determining whether a gross receipts tax must be apportioned has created great confusion in state courts—confusion only this Court can resolve. The Washington Supreme Court's holding that the Commerce Clause does not bar a city from imposing a business activity tax on 100 percent of a taxpayer's gross receipts derived from interstate activities—the vast majority of those activities occurring outside of the Cities—is but one example of the continued confusion.

As acknowledged by this Court in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), a gross receipts tax that is akin to an income tax is required to be apportioned to reflect the location of the various interstate activities by which it was earned. Conversely, sales taxes need not be apportioned provided they satisfy all other requirements articulated in *Jefferson Lines*. A great deal of confusion continues to surround the application of this distinction to business activity taxes—are they more akin to an income tax or a sales tax?

This Court has been asked repeatedly to apply its Commerce Clause holdings to the unique aspects of Washington taxes. The Court provided much-needed guidance on the application of its Commerce Clause holdings to Washington taxes in *Washington Department of Rev. v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978 and *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987). It is again time for this Court to offer its much-needed advice on the application of its apportionment rules to this Washington tax.

Additionally, the conflict over whether the imposition of a business activity tax on a taxpayer's unapportioned gross receipts is fairly apportioned is no longer an issue limited to unique Washington state and local taxes. States and cities across the United States have increasingly adopted alternative tax regimes that differ greatly from traditional income taxes. State courts around the country are divided on how to properly apportion such taxes. A denial of *certiorari* in this case will only allow the problem to persist and will perpetuate confusion and uncertainty with governmental tax policy makers and the taxpaying business community.

Lastly, action from the Court is necessary on order to halt attempts by state and localities to deceptively label taxes as either specific to transactions or specific to activities in order to avoid long-standing principles of this Court that may apply in one instance but not the other. For example, the imposition of a sales tax upon the entire value of a transaction may be proper under factual circumstances that would not support the apportionment by a state of tax on a corporation's income. In *Norton Co. v. Dept. of Rev.*, 340 U.S. 534 (1951), the Supreme Court established the so-called dissociation test providing that even if a taxpayer maintains a business within the taxing state, there is no nexus for activities occurring outside the state if the "particular transactions are dissociated from the local business and interstate in nature." 340 U.S. at 537. However, the Court noted that the dissociation rule applies in the context of an Illinois' Business Occupation tax that fell on the vendor, but not in the context of sales and use taxes where the impact is on the local buyer or user. *Id.* Thus, the initial characterization of a tax can vary the appropriate rule that should be applied.[2]

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[2] Other decisions by the Court reinforce the requirement that when a taxpayer is subject to a direct tax on its use of goods or services (as opposed to a sales or use tax), the transaction being taxed must have a substantial association with the taxpayer's in-state activities. *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 560 (1977) (" 'showing that particular transactions are dissociated from the local business' "is "fatal to a direct tax"); *Standard Pressed Steel Co. v. Washington*, 419 U.S. 560, 562-562 (1975) (distinguishing *Norton* because this taxpayer used a permanent in-state employee for purpose of "realization and continuance of valuable contractual relations between [taxpayer] and Boeing").

ARGUMENT

I. THIS COURT SHOULD OFFER GUIDANCE ON WHETHER APPORTIONMENT IS REQUIRED FOR GROSS RECEIPTS TAXES THAT ARE NOT TRANSACTIONAL IN NATURE UNDER *JEFFERSON LINES*

The key issue in need of resolution in this case is the application of this Court's clear requirement that income taxes be fairly apportioned in the sense that the tax base must be divided to fairly reflect the taxpayer's activities within the state. States and localities have repeatedly argued that business activity taxes imposed on gross receipts are more akin to sales taxes that need not be apportioned in the sense of a division of the tax base.

In 1977, the Supreme Court adopted a four-part test for determining whether a state or local tax on an interstate business is valid under the Commerce Clause. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In *Complete Auto*, the Court sustained a tax under the Commerce Clause only when the tax is "applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279. It is the second requirement—fair apportionment – that is at issue in this case.

The Supreme Court subsequently further refined the fair apportionment prong of the Commerce Clause analysis. To be fairly apportioned, a tax must be both internally and externally consistent. *Goldberg v. Sweet*, 488 U.S. 252 (1989).

Even before the Court consolidated its disparate Commerce Clause tests in *Complete Auto* and *Goldberg v. Sweet*, the Court was confronted with the question of the constitutionality under a fair apportionment analysis of a tax on the unapportioned gross receipts of a business earning those receipts in multiple jurisdictions. In *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948), the State of New York sought to impose an unapportioned gross receipts tax on all the taxpayer's nationwide gross receipts from transportation services, even though 43% of the transportation (measured by mileage) actually took place in New Jersey and Pennsylvania. The Supreme Court held that the tax violated the Commerce Clause because it was not apportioned:

> New York claims the right to tax the gross receipts from transportation which traverses New Jersey and Pennsylvania as well as New York. To say that this commerce is confined to New York is to indulge in pure fiction. To do so, does not eliminate the relation of Pennsylvania and New Jersey to the transactions nor eliminate the benefits which those two States confer upon the portions of the transportation within their borders. Neither their interests nor their responsibilities are evaporated by the verbal device of attributing the entire transportation to New York.

Central Greyhound, 334 U.S. at 660.

Central Greyhound predates the now-classic four-part Commerce Clause test of *Complete Auto* discussed above, under which all state and local taxes are tested. However, *Central Greyhound* remains a pertinent precedent for purposes of testing gross receipts taxes, as can be seen from this Court's

decision in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). There, the Court distinguished the apportionment analysis of a tax on a distinct transaction (such as a sales tax) from a tax on the income from business activity (such as the gross receipts tax imposed by the Cities in this case).

A state imposing a gross receipts tax in the form of a sales tax does not necessitate the same apportionment requirements because the manner in which the tax is imposed, and any allowable credits, prevents a concern with double taxation. In acknowledging *Central Greyhound* covered the same type of bus services provided by Jefferson Lines, the Court in *Jefferson Lines* noted

> Here, in contrast, the tax falls on the buyer of the services, who is no more subject to double taxation on the sale of these services than the buyer of goods would be. The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination.

Jefferson Lines at 190. See also *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) where the Court looked at New Mexico's gross receipts tax (akin to a sales tax) and stated, "The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine." *Id.* at 260.

The tax imposed by the Cities, however, is not akin to a sales tax. Their gross receipts tax is for the privilege of doing business in the Cities. It is clearly imposed on the Petitioner and it does not fall upon the buyer of the good or service. Similar to *Central*

Greyhound, the gross receipts tax imposed by the Cities is "simply a variety of tax on income, which was required to be apportioned to reflect the location of the various interstate activities by which it was earned." *Jefferson Lines* at 190. The Supreme Court of Washington in its decision does not dispute this point by stating

> B & O taxes . . . are not sales taxes. . . . [T]he taxable incident . . . is "*engaging* within the City *in the business of* making sales . . . at wholesale," not merely "making sales at wholesale."

App. 24a.

However, while the Supreme Court of Washington acknowledges the Cities tax is different from a sales tax, its analysis of the constitutionality of the Cities tax under *Complete Auto,* based on the Cities' business activity taxes being a variety of an income tax, is lacking. The court simply cites *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987), as its overwhelming authority to find the Cities' taxes pass constitutional muster under the Commerce Clause.

The Supreme Court of Washington's analysis is too facile. It fails to take into account that *Jefferson Lines* reaffirmed the Court's holding in *Central Greyhound* that a gross receipts tax that operates as a variety of an income tax must be apportioned among the jurisdictions in which the activities generating the receipts are performed. Following the *Jefferson Lines* decision, three preeminent state tax scholars and academicians examined the distinction between sales and gross receipts taxes for Commerce Clause purposes, in light of *Jefferson Lines*:

> In distinguishing those levies whose tax base must be divided among the states in order to satisfy the Commerce Clause's fair apportionment requirement from those levies whose tax base may be taxed in full by a single state without offending the Commerce Clause, the Court in *Jefferson Lines* drew a line in the sand between 'sales taxes' and 'gross receipts taxes.' The Court treated the former as a levy on a 'taxable event' that occurred, or was deemed to occur, wholly within the state, thereby making apportionment of the base unnecessary. *The Court treated the latter as 'simply a variety of a tax on income, which was required to be apportioned to reflect the location of the various interstate activities by which it was earned.'*

W. Hellerstein, M. McIntyre, & R. Pomp, "Commerce Clause Restraints on State Taxation After *Jefferson Lines*," 51 Tax L. Rev. 47, 86 (1995). Thus, *Central Greyhound*, as affirmed in *Jefferson Lines*, requires the apportionment of a gross receipts tax among the jurisdictions in which the activities generating the receipts are performed.

In summary, *Jefferson Lines* teaches us that a gross receipts tax not operating like a sales tax has to be apportioned; *Complete Auto* teaches us that a tax must be fairly apportioned; *Goldberg v. Sweet* teaches us that to be fairly apportioned, a tax must be imposed only on the "portion of the revenues from the interstate activity which reasonably reflects the instate component of the activity being taxed"; and *Central Greyhound* teaches us that for a gross receipts tax to reasonably reflect the instate component of the activity being taxed, it must be apportioned among all of the jurisdictions in which

the activity creating the tax is performed. Thus, under *Jefferson Lines*, *Complete Auto* and *Central Greyhound,* the Cities' taxes on gross receipts must be apportioned and under *Goldberg v. Sweet*, the apportionment method must account for all of the jurisdictions in which the activity generating the taxed receipts occurs. Hence, the relevant inquiries are: "what is the activity being taxed?" and "where is that activity carried on?"

The Petitioner in this case is being taxed on its activity of wholesaling motor vehicles. The logical next step in the constitutional analysis under *Goldberg v. Sweet* is to locate where that activity is performed. The Cities' position would place 100% of the activity in the Cities while the Petitioner's position would place something less in the Cities. Thus, the location of the activity being taxed (wholesaling vehicles) is both within and without the Cities—with much more of the activities to make the sale occurring outside of and not within the Cities.[3]

Thus, since the Cities are taxing 100% of the receipts but only a portion of those receipts are attributable to the Cities, the Cities are taxing more than the activity which reasonably reflects the instate component of the activity being taxed. Because the Cities are taxing more than their reasonable share of the activity, their application of their business activity taxes to 100% of the Ford's wholesale receipts is unconstitutional.

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[3] Ford presented uncontroverted evidence that less than one percent of its gross income was derived from activities conducted in the City of Tacoma. See Appellate Brief of Petitioner filed before the Supreme Court of Washington, Case 77516-8, at p. 21.

II. THE APPORTIONMENT OF BUSINESS ACTIVITY TAXES IS A PERSISTENT AND WIDESPREAD PROBLEM IN NEED OF CLARIFICATION BY THIS COURT

Amici are gravely concerned with the recent growth in the imposition of business activity taxes on unapportioned, interstate gross receipts. With nearly 1,200 separate state and local business activity taxes collected by state and local governments,[4] such taxes have increasingly become the subject of litigation around the country. Petitioner cites a number of city and state cases involving the issue of fair apportionment of business activity taxes. As evidenced in Petitioner's brief, courts around the country are divided on whether the Commerce Clause requires apportionment of business activity taxes on gross receipts derived from multistate activity. *Amici* submit this brief to bring to the Court's attention just how varied the rulings on the apportionment of business activity taxes are and how significant the issue is to multijurisdictional taxpayers.

A. The Issue of Unapportioned Gross Receipts Taxes is a Real and Emergent Issue

The number of states and localities that impose business activity taxes based upon unapportioned gross receipts is significant. As noted in Petitioner's brief, the types of these taxes range from newly

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[4] *See* Ernst & Young, E tax Alert, Quantitative Economics and Statistics; State and Local Taxation (March 7, 2007) available at http://www.ey.com/global/content.nsf/US/Tax_-_Quantitative_Economics_and_Statistics_-_Overview.

enacted state-level taxes[5] to a plethora of existing local business activity taxes.

An example of a typical business activity tax based upon gross receipts can be found in Kansas City, Missouri. Kansas City, like many Missouri municipalities, imposes business license taxes on individuals and companies for the privilege of doing business in Kansas City. Kansas City, Mo. Ordinance § 40-61 (1967). The tax is imposed at different rates on different business activities, but in many instances, the tax is imposed based upon a percentage of "gross receipts" from business done in Kansas City. Kansas City, Mo. Ordinance § 40-63 (1967). The Kansas City ordinance does not allow the tax to be apportioned to account for any portion of business activity that occurs outside of the city. *Id.*

Bristol, Tennessee offers another example of an ordinance imposing a tax on unapportioned gross receipts. Bristol, like many Tennessee cities, imposes an annual tax on the privilege of doing business within the city. Bristol, Tenn. Ordinance § 66-28 (1980). The tax is based upon a Tennessee statute allowing for the imposition of municipal taxes on the "gross income" of companies doing business in Tennessee cities. Tenn. Code Ann. § 67-4-701, *et seq.* (2007). Like the Kansas City tax, the Bristol tax is not apportioned to account for business activity occurring outside of the city.

Kansas City and Bristol offer but two examples of the 1,200 other taxes imposed on gross receipts. Like

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[5] Three states have recently imposed gross receipts taxes: The Ohio Commercial Activities Tax (H.B. 66, 2005), The Texas MarginTax (H.B. 3, 2005), and the Michigan Business Tax (S.B. 94, 2007).

Kansas City and Bristol, many of the gross receipts taxes do not allow for the apportionment of receipts where some activity occurs outside of the locality. As demonstrated below, the requirement that these taxes be apportioned has led to litigation in many states to determine whether the lack of apportionment violates the Commerce Clause.

B. Some State Courts Have Held that the Commerce Clause Requires Apportionment of Business Activity Taxes.

When confronted with the issue of fair apportionment of a business activity tax, some state courts have ruled in favor of apportionment, taking the position that to do otherwise would be a Commerce Clause violation. For example, Pennsylvania courts have heard several cases on this issue and generally rule for an apportionment requirement. In Pennsylvania's seminal case on this issue, *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003), the City of Philadelphia attempted to impose a business activity tax on 100 percent of the taxpayer's media receipts although one-half of the games were telecast from venues outside of the city. The Supreme Court of Pennsylvania held that the City of Philadelphia could only impose a business activity tax on revenue generated from games played and broadcast from within Philadelphia, and not media receipts generated from away games. *Id.* at 135. Because the City attempted to apply the tax to all of the receipts, the business activity tax, as applied, violated the Commerce Clause because it failed the external consistency prong of the fair apportionment test. *Id.* at 135.

In *Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004), the Pennsylvania Supreme Court reached a similar result when it held that a business activity tax imposed on 100 percent of a taxpayer's gross receipts from in-state and out-of-state activity violated the Commerce Clause because the vast majority of the company's business took place out-of-state. *Id.* at 799. In *Northwood Construction*, the taxpayer maintained its principal place of business in the Township of Upper Moreland, yet its primary business activities were conducted throughout Pennsylvania, as well as in three other states. The Township attempted to impose its business activity tax on all of the taxpayer's out-of-state receipts. Utilizing this Court's tests in *Complete Auto* and *Goldberg*, the court ruled that although a taxing jurisdiction may impose a business activity tax on receipts from out-of-state work where the taxpayer maintains a base of operations within the municipality, such treatment is unconstitutional where most of the taxpayer's business activity is conducted outside of the state. *Id.* at 799.

California courts have also discussed this issue. In *City of Los Angeles v. Shell Oil Co.*, 480 P.2d 953 (Ca. 1971), the Supreme Court of California held that only gross receipts directly attributable to selling activities carried on in the City were taxable. In holding that the application of a business activity tax exceeds the City's constitutional powers, the Supreme Court of California stated that the City "refuses to take cognizance of . . . [substantial] out-of-city elements in the measure of its tax—and accordingly purports to tax the total gross receipts derived from the sales in question—solely because the goods are shipped from the City. Such an application . . . is

violative of . . . constitutional principles." *Id.* at 966. *See also General Motors Corporation v. City of Los Angeles*, 486 P.2d 163, 173 (Cal. 1971) (stating that the inclusion of unapportioned gross receipts within the tax base results in the taxation of significant extraterritorial values where substantial elements of the sale process which produces such receipts takes place outside the City); *Volkswagen Pacific, Inc. v. City of Los Angeles*, 496 P.2d 1237, 1245 (Cal. 1972) (Court barred assessment of business activity taxes where the city did not apportion the tax to account for selling activity outside the city limits).

Missouri courts have also held that the application of a business activity tax to unapportioned gross receipts is unconstitutional. In *General Motors Corp. v. City of Kansas City,* 1993 Mo. App. LEXIS 1985 (Mo. Ct. App. 1993), the taxpayer operated an automobile assembly facility in Kansas City. Despite the fact that the greatest percentage of the parts used to assemble the automobiles were manufactured outside of Kansas City, the City attempted to assess its business activity tax upon the total value of cars manufactured in Kansas City. The Court of Appeals of Missouri, Western District, held that the city's business activity tax, as applied, was unconstitutional because the tax was not limited in its application to manufacturing that occurred within the city. *Id.* at 26. A similar result was reached in a more recent Missouri case, *Ford Motor Co. v. City of Hazelwood,* No. 02CC-002296 Slip Op. (St. Louis County Cir. Ct., Mo. 2003), where the St. Louis County Circuit Court held that a business activity tax imposed upon unapportioned gross receipts from vehicles assembled in the city of St. Louis was unconstitutional as applied. *Id.* at 9-13.

In *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996), the Supreme Court of Virginia struck down the application of a business activity tax to unapportioned revenues as unconstitutional. There, the taxpayer maintained its corporate headquarters in Winchester, but operated 24 facilities in 13 different states—none of which were located in the city. Winchester attempted to impose its business activity tax on 100 percent of the taxpayer's gross receipts, arguing that since the taxpayer is a highly centralized, unitary business all of its gross receipts were in some way attributable to the headquarters office. The Supreme Court of Virginia rejected this argument stating that the imposition of the tax was invalid because it was not apportioned as required by the Commerce Clause. The court reasoned that given the number of facilities and operations outside of the taxing jurisdiction, the value added by the taxpayer's operations within the City could not possibly produce 100 percent of the revenues. *Id.* at 498.

Despite the fact that the majority below supported imposing a business activity tax on unapportioned gross receipts, in *KMS Financial Services, Inc. v. City of Seattle*, 146 P.3d 1195 (Wash. Ct. App. 2006), the Court of Appeals of Washington took the position that "seeking to tax income generated by extra-territorial activities . . . exceeds federal and state constitutional limits." *Id.* at 1198. In *KMS*, the taxpayer was a Washington corporation based solely in Seattle. The taxpayer had nearly 300 registered representatives who worked from 210 business locations in nine western states, including Washington. The City of Seattle imposed its business activity tax on all commissions received at the taxpayer's Seattle office regardless of where the registered representa-

tive who generated the commission was based. The Court of Appeals of Washington held that attributing the entire proceeds of taxpayer's registered agent to the city merely because that was the taxpayer's sole office violated the external consistency requirement of fair apportionment, and thus violated the Commerce Clause. *Id.* at 1206

In addition to the aforementioned cases, other state court decisions have sided with the position that federal Commerce Clause jurisprudence requires the apportionment of multistate gross receipts used to determine a taxpayer's liability for a business activity tax. *See,* e.g. *Southern Pacific Transp. Co. v. Arizona*, 44 P.3d 1006, 1013, 1017 (Ariz. App. 2002) (stating that a business activity tax on an interstate transaction "will violate the Commerce Clause in the absence of fair apportionment" and holding that a business activity tax could not be constitutionally applied to a taxpayer's railroad gross receipts from transporting goods between the taxing jurisdiction and other points in the state where a portion of the journey occurred in another state); *Northwest Energetic Services, LLC v. California Franchise Tax Bd.*, No. A114805 (Cal. Super. Ct. 2007) (appeal pending) (holding that a business activity tax was required to be fairly apportioned); *General Motors Corp. v. City and County of Denver*, 990 P.2d 59, 71 (Colo. 1999) (acknowledging that a business activity tax must be fairly apportioned and "may only be imposed on interstate activity that 'reasonably reflects the in-state component of the activity being taxed'" (citing *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989))); *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991) (where an assessment under Michigan's business activity tax, which is levied

based upon a three-factor apportionment formula, was at issue).

C. Other State Courts Have Held that the Commerce Clause Does Not Require Apportionment of Business Activity Taxes.

Some state courts have interpreted the Commerce Clause as not requiring the apportionment of business activity taxes. A Delaware Superior Court upheld the imposition of a business activity tax on unapportioned gross receipts based upon the magnitude of the taxpayer's operations in the state. In *Saudi Refining, Inc. v. Director of Revenue*, 715 A.2d 89 (Del. Super. 1998), the taxpayer was a Delaware corporation with its principal place of business in another state. Despite the fact that the only sales the taxpayer made in Delaware was to a single Delaware corporation, the state imposed its business activity tax on the taxpayer's gross receipts attributable to sales of tangible personal property physically delivered in Delaware. The court found that the magnitude of the goods purchased and the length of time the goods were within the state created sufficient nexus to bring the taxpayer within the purview of the tax. *Id.* at 92.

Further, other state courts have taken the position that the Commerce Clause does not require the apportionment of a business activity tax imposed on gross receipts derived from activity within and without the taxing jurisdiction. *See e.g. Ramsay Travel, Inc. v. Kondo*, 495 P.2d 1172, 1176 (Haw. 1972) (stating that a tax on 100 percent of commission income received by taxpayer from sales derived within and

without the state did not contravene the Commerce Clause);

CONCLUSION

In conclusion, the Cities' imposition of its Business Privilege Tax on 100 percent of Ford's wholesaling receipts is unconstitutional because the receipts arose from activities both within and without the Cities. *Amici* respectfully requests this Court to accept the taxpayer's Petition to clarify this issue of national importance.

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